MISSISSIPPI LAW JOURNAL

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The *Mississippi Law Journal* is published three times annually in April, August, and December. Editorial and business offices: *Mississippi Law Journal*, Post Office Box 849, University, Mississippi 38677.

Current subscription: $25.00 per year. Single issue: $8.50. Subscriptions are renewed automatically upon expiration unless the subscriber sends notice of termination.

Change of address: Send address changes directly to the *Mississippi Law Journal.* Include name, new address (including zip code), and old address. Please notify 45 days in advance to ensure prompt delivery.

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Second class postage paid at University, Mississippi 38677 and additional mailing offices.

Citations conform to A Uniform System of Citation (14th ed. 1986).

The *Mississippi Law Journal* is a member of the National Conference of Law Reviews.

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Mississippi Law Journal

Published by Students at the University of Mississippi School of Law

VOLUME 58 FALL 1988 NUMBER 2

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SYMPOSIUM ON EDUCATION

FOREWORD

The *Mississippi Law Journal*'s Symposium on Education provides a collection of articles on a broad range of legal issues facing the education community, parents and students. From Governor William Winter's historical analysis of the *Development of Educational Policy in Mississippi* to Judge Constance Baker Motley's historical perspective on *Desegregation and Education* to Freeland, Freeland & Wilson's article on equity funding, the symposium encompasses the roots of our present system as well as the cutting edge of emerging legal issues.

In the last presidential campaign there was a great deal of debate heralding education as the "issue of the 1990s." As we all know, education is not and should not be an issue whose popularity fades with the passage of time. In order for our state to progress in the areas of economic development, health care, the reduction of crime or virtually any area of social concern, education is the key. Our efforts to make sure all Mississippi children receive a quality education must not cease. We must vigorously search out new ideas and ways of teaching students the skills they must have to compete in a rapidly changing world.

The Symposium on Education examines and tackles issues facing policy makers and educators. Each article focuses on an area of the law by examining the historical development of a particular problem or legal issue. Most importantly each writer raises questions about the future and often supplies potential solutions. Sometimes asking the right question is as critical as finding an answer. By framing and thoughtfully examining ideas, the articles collected here help illuminate the paths we must pursue.

Dr. Robert J. Beebe's article on the *Legal Status of Functional Literacy Examinations* provides a valuable discussion of the use of functional literacy tests as a measurement of how well efforts to reform public education have succeeded. James A. Keith has distilled into an excellent article, *Aids in the Class-*

room, the statutory, judicial and administrative material. Oxford attorneys, T.H. Freeland, III, T.H. Freeland, IV, and Tim Wilson, collaborated to produce an insightful and thought-provoking article on the history of equitable funding in Mississippi and potential legal challenges to inequities in funding of school districts. This analysis is particularly timely in light of recent action by the legislature addressing the problem. Carolyn Ellis Staton contributes an overview and analysis of federal statutory and constitutional provisions that provide protection to students and school employees from discrimination on the basis of sex. An article by Owen T. Palmer, Jr. examines the history and future of sovereign immunity for our state's school districts.

I commend the *Mississippi Law Journal* and particularly the Symposium Editor, Dinetia Newman, for encouraging some of our state's best minds to turn their thoughts and skills to this most important topic.

Governor Ray Mabus

DEVELOPMENT OF EDUCATIONAL POLICY IN MISSISSIPPI

*William F. Winter**

A review of the development of public education policy in Mississippi is not an easy or exact exercise. One's first impression is that over the course of our two hundred-year history public opinion has not always been on the side of public education or, at least, of quality public education. There is much anecdotal evidence to support that conclusion. For generations there was no perceived need for more than a cursory introduction to formal education in a society that was largely rural and agricultural. If this attitude prevailed in the white community, its effect in the black population was incredibly more abysmal.

The first official recognition of the need for a state-wide system of public education in Mississippi is found in the inclusion of an article in the Constitution of 1869 providing for a state superintendent of education, an ex-officio board of education and a four-month annual school term.[1] The same article, only slightly modified, was later adopted as a part of the Constitution of 1890.[2] One significant addition was a provision calling for separate schools for whites and blacks.[3]

Despite able leadership from those early state superintendents who constantly goaded the legislature into giving support to public schools, the state's resources were so limited, its economy so agricultural, and its resistance to any significant change at the local levels so great that no meaningful progress in the improve-

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* William Winter is a senior partner in the law firm of Watkins, Ludlam & Stennis in Jackson, Mississippi. A graduate of the University of Mississippi Law School where he was Editor-in-Chief of the *Mississippi Law Journal*, he served as Governor of Mississippi from 1980 to 1984. He was recently named the Jamie L. Whitten Professor of Law and Government at the University of Mississippi Law School for the 1989 fall semester.

[1] MISS. CONST. of 1869, art. VIII.

[2] MISS. CONST. art. VIII.

[3] *Id.*

ment of the education of the masses of Mississippi children occurred in those latter years of the nineteenth and early years of the twentieth century. During this period financial support for public education came in relatively modest amounts from tuition, local tax levies, Chickasaw Session revenues, Sixteenth Section funds and a general appropriation made by the legislature.[4]

Beginning with the action of the 1910 session of the legislature creating in Hattiesburg a normal college for teacher training and setting up a school consolidation and transportation system, the state slowly began to move toward a more effective program.[5] Seven years later a system was established to emphasize vocational training.[6]

It was in the consolidation of rural schools that the fiercest and most violent opposition to education developed. W.F. Bond, who served as state superintendent of education during these early consolidation efforts, reports in his memoirs the problems that he confronted:

> In order to establish these better schools we had to get the people not only willing to give up their local schools in many instances, but also willing to pay taxes to lengthen the school term, to build larger and better school buildings and to pay for the transportation of the school children living too far from the new school building to walk. Many good citizens thought the school that had been good enough for them and their parents was good enough for their children. In many instances the fight was carried into the courts and sometimes even to the Supreme Court of the State. Several new school buildings were burned, some more than once.[7]

---

[4] 2 L. McLEMORE, A HISTORY OF MISSISSIPPI 396 (1973).

[5] *Id.*

[6] 1910 MISS. LAWS ch. 119 (codified at Hemingway's 1917 § 6078).

[7] W. BOND, I HAD A FRIEND 98 (1958). Bond recounts at considerable length the difficulties of securing convictions in such cases. He recalled one in particular where bloodhounds were used to track the accused. The defense attorney's argument which resulted in an acquittal was quoted as follows:

> Your honor, this man's wife has sworn that he was at home all night on which night the school building was burned. All the evidence you have against my client is that the bloodhounds picked up a trail on the school grounds and came to this man's house. On the one hand, we have the testimony of one of the finest, most truthful and lovable women in this whole county who says that this man is innocent. On the other hand, your honor, what do we have against

The question of equity funding has always been and remains a major problem in seeking to equalize educational quality. Efforts at providing additional support for poor districts were made as early as 1912. The legislature in that year appropriated the magnificent sum of five thousand dollars to aid the poorer counties.[8] However, in the following year the Mississippi Supreme Court declared the supplemental funding procedure unconstitutional in *State Board of Education v. Pridgen.*[9]

In the meantime, the state constitution was amended in 1914 to provide for a procedure of initiative and referendum.[10] Under this authority, a petition was filed in 1919 proposing an amendment to section 206 of the constitution that would overrule the *Pridgen* case and permit the legislature to make appropriations to equalize educational efforts. While that amendment passed overwhelmingly, in a subsequent unrelated case three years later, the supreme court voided the initiative and referendum section, thus invalidating the process whereby the 1919 amendment was added.[11] However, in a case specifically addressing the issue of equalization, the court by a four to two vote effectively reversed *Pridgen* and gave sanction to the equalization of schools.[12] That funds have not yet been equalized attests to the complexity and pervasiveness of the problem.

The battles against consolidation created a generation of lawsuits that occupied the attention of the courts over a period

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the testimony of this good woman, nothing but the action of two dogs.

Id.

[8] 1912 MISS. LAWS ch. 5. This legislation allowed counties to use the funds when the money provided under the general apportionment formula was insufficient to cover the expenses of operating schools for the constitutionally mandated four month term.

[9] 106 Miss. 219, 63 So. 416 (1913). The *Pridgen* court held that the apportionment formula set forth in the constitution was to be the sole method of distributing state funds for education. *Id.* at 233, 63 So. at 418.

[10] 1914 MISS. LAWS ch. 520 (amendment to MISS. CONST. § 33). In this attempt to amend § 33 of the Mississippi Constitution, the legislature maintained that in granting to the legislature the power to make laws, the people of the state reserved unto themselves the right to formulate law through initiative and referendum. *Id.*

[11] *See* Power v. Robertson, 130 Miss. 188, 93 So. 769 (1922) (holding that power to amend constitution was never allocated to legislature).

[12] *See* Miller v. State *ex rel.* Russell, 130 Miss. 564, 94 So. 706 (1922) (holding constitution's funding formula was minimum standard which, once met, could be ignored in distributing educational funds).

of more than twenty years. Repeated challenges to the constitutionality of the legislative enactments relating to consolidation were raised in a myriad of cases beginning with *Bufkin v. Mitchell*[13] in 1913. Generally, the courts favored interpretations of the constitution and the statutes that resulted in the mergers of schools. The legislature aided the process by adopting various curative acts that eliminated objections to irregularities in the legal proceedings.

In addition to the efforts at consolidation and equalization, the most significant developments in the years between the two World Wars were the recognition of certain basic standards of accreditation for both secondary and elementary schools and the passage in 1940 of legislation providing free textbooks for students.[14] Despite modest advances, national surveys still revealed many deficiencies; particularly in the rural schools and in almost all of the woefully inadequate black schools. It was not until the early 1950's that major new initiatives were proposed.

While it is probable that this effort would have been undertaken in any event, its urgency was amplified by increasing concern among the state's political leaders over the prospect that the separate school systems for whites and blacks that had enjoyed legally sanctioned status under the rule of *Plessy v. Ferguson*[15] would be eliminated by the United States Supreme Court.

At the 1952 session of the legislature a concurrent resolution

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[13] 106 Miss. 253, 63 So. 458 (1913)(holding that when consolidating rural schools it was not improper diversion of school funds to use them in busing students to central location). *See* Bullock v. Sanford Consol. School Dist., 153 Miss. 476, 121 So. 267, 271 (1929) (holding that in passing general law ratifying creation of all school districts legislature gave tacit approval of location of school buildings, which therefore were not required to be moved merely because school districts were redrawn); Board of Supervisors v. Brown, 146 Miss. 56, 111 So. 831, 832 (1927) (failure of school board to designate location of school house held fatal to creation of consolidated school districts); King v. Board of Supervisors, 133 Miss. 494, 97 So. 811, 812 (1923) (statute authorizing consolidation of school districts held not unconstitutional as violative of due process, since it provided for notice to and hearing of taxpayers in such districts).

[14] 1940 MISS. LAWS ch. 202 (codified at 1930 Code § 6634-6658).

[15] 163 U.S. 537 (1896). In Plessy v. Ferguson, the United States Supreme Court held that the act requiring that white and black train passengers be provided separate accommodations did not violate the due process, privileges and immunities, or equal protection clauses of the fourteenth amendment, thereby establishing the 'separate but equal' doctrine.

was adopted creating a special committee to study the state's school needs and make recommendations for appropriate action.[16] This official action followed a year-long survey of public education by business and professional leaders. That group, known as the Mississippi Citizens' Council on Education (not to be confused with the segregationist White Citizens' Council), made a series of sweeping recommendations regarding the reorganization of public education in the state. Significantly, included in the recommendations was an unprecedented increase in taxes to fund the changes which the group felt were essential.

The work of the legislative committee represented the first systematic effort to examine the state of public education in Mississippi. It is the point of beginning for this discussion of the formulation of our state's educational policy. To understand this process it is necessary to remember whence we have come since that time.

Prior to the 1950s there had been little or no thought given to the maintenance of a "separate but equal" school system under the long-established prerogatives laid down in the *Plessy* decision. The word "separate" was emphasized to the almost total omission of the word "equal" with appalling results. It was found, for instance, that only one white child in four and one black child in forty were graduating from high school.[17] Although the committee was composed of Mississippi legislators who were committed to a racially segregated society, it delivered this shocking declaration:

> The condition of Mississippi's schools for Negroes in rural areas is pathetic and in some cases it is inexcusable.
>
> Hundreds of children of the Negro race are compelled to attend school - if they attend at all - in unpainted, unheated and unlighted buildings that are not fit for human habitation and should have been condemned many years ago.
>
> There are very few rural schools for Negroes in Mississippi that have sanitary drinking water facilities or sanitary toilet

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[16] 1952 Miss. Laws H.C.Res. 32.

[17] Recess Education Committee, Report to the 1953 Mississippi House 16 (1953). The comparison is even more tragic when one considers the inferiority of the education received by black high school graduates.

facilities.

> According to the report of the State Auditor, copies of which are on file in the records of this committee, in many counties money specifically appropriated for equalizing the pay of Negro teachers which was sent to the counties for that purpose never got to the Negro teachers. For that matter, it has never been returned to the State Treasury, either. The Committee does not know for what purpose the money was spent.[18]

If conditions were deplorable in the black schools, they were far from ideal in the white. Commenting on the fact that Mississippi had more than 500 separate statutes pertaining to public education, the committee reported that the system was operating under "a hopeless patchwork of laws that are difficult to interpret and equally difficult to administer."[19] The study further revealed that in spite of a generation of consolidation efforts, the state had at least 2,079 different school districts, about twenty-five per county. Most other southern states had fewer than 200. Approximately one-half of all the schools in the state had no more than two teachers.[20]

In terms of public expenditures for education, the story was equally depressing. In the school year 1951-52, Mississippi invested the sum of $67.00 per pupil against a national average of $180.00. Much of this deficiency was found to be at the expense of black students. The differential in Tunica County, for example, was reflected in the figures of $270.00 for whites and $21.00 for blacks. In few districts was the disparity less than four to one.[21]

It is not surprising, therefore, that the Committee viewed with understated apprehension the cases pending before the United States Supreme Court challenging the "separate but equal" doctrine. That concern was expressed in the call for quick action in upgrading the state's obviously inadequate and unequal system of education. Significantly, the report emphasized what it characterized as a "public interest [that] has been

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[18] *Id.*

[19] *Id.* at 14.

[20] *Id.*

[21] *Id.* at 113.

and is now aroused in the educational problems of this state."[22] That the motivation may have been the pending *Brown*[23] decision did not detract from the importance of the reforms that the Committee was recommending.

The Committee went far beyond the immediate issue of "separate but equal," and its efforts represented a sweeping revision of the structure of public education in the state. Never before had so thorough a modernization of the system been attempted by the Mississippi legislature. The recommendations addressed the issues of consolidation, governance, financing, physical facilities and curriculum.[24]

Eventually enacted in a special session called by Governor Hugh White in the fall of 1953, the Minimum Foundation Program, as it came to be known, embraced the major proposals of the Committee report.[25] At the heart of the process was the elimination of the outdated equalization method of funding and the substitution of a formula that applied uniformly and that had the effect of substantially increasing the state's commitment. At the same time a mandate for a major consolidation effort was voted along with a state subsidy to launch a massive new building program. Here the essential factor was a requirement that no county could qualify for the new building funds until it had submitted an acceptable consolidation plan to the state agency, known as the Education Finance Commission, created specifically to oversee the difficult and vexing process of consolidation. While no one has suggested that the concept was flawless, it did serve to reduce the number of school districts from almost 3,000 to fewer than 200.[26]

Two other recommendations that were contained in the original report, although later withdrawn by the committee under public pressure, involved the appointment rather than the election of the state superintendent and the county superintend-

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[22] *Id.* at 51.

[23] Brown v. Board of Education, 347 U.S. 483 (1954). For a thorough examination of the *Brown* decision and its aftermath see J. H. WILKINSON, FROM BROWN TO BAKKE (1979).

[24] *Report*, *supra* note 17, at 16.

[25] 1953 MISS. LAWS ch. 14 (codified at 1942 Code § 6248-01).

[26] *Id.*

ents of education. Had these proposals been approved at that time, there is every reason to surmise that our present system of education would be further along the way to excellence.

While the basic substantive reforms were enacted in the fall of 1953, it would be another year and a half before the new revenue would be provided to make it fully operational. In the meantime, the 1954 *Brown* decision exploded like a fireball over a state whose white leadership had vowed eternal resistance to racial integration of its public schools. The development of school policy now took an ominous and ugly turn. With the Minimum Foundation Program partially enacted, but with funding deferred, another special session met in September, 1954, to consider the options. It lasted three weeks and consisted primarily of a series of irate speeches bashing the United States Supreme Court. The principal accomplishment was the passage of a constitutional amendment repealing the state's obligation to provide public schools for its children and conferring on the legislature the specific authority to abandon them if it saw fit.[27] It was not public education's finest hour.

However, with the amendment overwhelmingly ratified in a special December referendum, its approval operated as a pressure release valve that enabled the legislature to enact the tax bills necessary to put the Minimum Foundation Program into full effect.[28] There followed more than a decade of belated and sometimes frantic efforts at "equalizing" what was obviously a doomed system of dual education.

Despite the preoccupation with the maintenance of the segregated status quo, and in the face of an increasing number of lawsuits against individual districts, there were encouraging signs. The most visible progress was in the improvement of physical facilities and in the consolidation and reorganization of districts.

The widespread predictions that the *Brown* decision would spawn a generation of litigation were correct. What was not anticipated by white Southerners was the ultimate commitment of

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[27] 1954 MISS. LAWS ch. 39 (extraordinary session)(amendment to MISS. CONST. § 213-B).

[28] 1955 MISS. LAWS ch. 46 (codified at 1942 Code § 6248-12).

the federal courts to insure compliance. Every conceivable device to delay or overturn the effect of the decision was thrown onto the strategy table. The principal effort was based on a course that would rely on continuing freedom of choice. This obviously was deemed preferable to forced integration by specific court order. The problem was that, for a variety of reasons, it was not producing any substantial desegregation. In the meantime, almost every school district in the state found itself embroiled in what appeared to be an unending series of legal battles. The decisions that resulted are too numerous to be referenced in this article. Suffice it to say that it was the most litigious era in the history of public education. That the thorniest of these issues have now largely been resolved reflects great credit on an entire generation of school officials, judges, and lawyers as well as on our system of jurisprudence that was threatened to be inundated by the sheer volume and intensity of the litigation stemming from *Brown*.

After more than fifteen years of delay and uncertainty in school desegregation, by 1970 the federal courts would brook no further token compliance. The orders decreed the elimination of all artificial barriers and mandated widespread busing, pairing of schools and other similar devices to achieve maximum integration.[29] In many areas there was a wholesale withdrawal of white students from the public schools, with the corresponding establishment of private segregated academies. Following the January, 1970, court orders, it is estimated that some 50,000 white students left the public schools, and approximately 1,000 teachers resigned from thirty school districts.[30] In a few districts, such as Wilkinson County, virtually all of the whites abandoned the public schools. This was followed by a reduction in local taxes for the support of public education.

The decade of the 1970s marked the period of greatest testing of the state's system of public education. Only through the dedicated and largely unheralded efforts of many professional

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[29] *See, e.g.*, Singleton v. Jackson Mun. Sep. School Dist., 426 F.2d 1364 (5th Cir. 1970) (court rejected "desegregation" plan for Jackson, Mississippi which had resulted in 17 of 38 schools having 90% or more black students).

[30] Jackson Clarion Ledger, Nov. 29, 1982, at A-1.

administrators, teachers and board members was a viable program maintained in the face of the countless dislocations and diminished public support. Still, despite the unrest in many areas, there persisted an overall public commitment to make the system work. Even after the whites' withdrawals, the public schools accounted for more than ninety per cent of total enrollment.

Nevertheless, as the state entered the 1980s, there was an obvious decline in morale among teachers and administrators who, having made the transition to a totally desegregated system, now saw a program continuing to be grossly underfunded and not performing in a nationally competitive way. Most of the indicators reflecting student achievement did not shine favorably on Mississippi.

At the 1980 session of the legislature these problems were recognized with the creation of an official task force to develop a program of educational reform.[31] This group, organized to some extent along the lines of the 1952 committee, also included business, professional and educational leaders as well as legislators. Jack Reed of Tupelo was named as chairman.

The Committee made its report to the governor and the legislature on December 15, 1980.[32] It suggested sweeping reforms. Among the more important recommendations were these:

1. Fiscal independence for all school districts,
2. Statewide kindergartens,
3. Compulsory attendance law,
4. School bond issues to require only majority approval,
5. Strengthened criteria for teacher certification,
6. Increased salaries for teachers and administrators.[33]

In addition to these educational programs, the panel recommended a major tax increase to fund the reforms and suggested sources of revenue. Unfortunately, it was not the best of economic times. The country had plunged into a major recession, unemployment in the state had moved above ten per cent, and

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[31] 1980 Miss. Laws ch. 618.

[32] Special Committee on Public Schools Finance and Administration, Report to the Legislature (1980).

[33] *Id.*

the political mood following the election of President Ronald Reagan opposed raising taxes. The economic and educational projections for the state were bleak.

The result was that at neither the 1981 nor 1982 regular sessions were the recommendations of the report approved. Because of the continuing recession there was not even the customary token increase in salaries at the 1981 session.

At about the same time a report of the Southern Regional Education Board further focused on the deficiencies in the South. Mississippi, as usual, did not fare well by comparison. The report drew attention to the need for improvement in education as a precursor for Southern students to compete in the more demanding global job market.

Even the newly-elected Reagan administration, although elected on a platform to eliminate the U. S. Department of Education, began to focus on the problems. Secretary of Education Terrell Bell promptly dismissed as absurd the idea of abolishing his Department and turned instead to the formation of a task force to begin the process of reform. The result was the dramatically effective 1983 report, "A Nation at Risk," that later served as a handbook on educational change.

In the meantime in Mississippi, although the report of its own legislative committee had been largely ignored, the 1982 session did approve a constitutional amendment that would replace the ex-officio State Board of Education with a larger lay board and that would provide for an appointed State Superintendent of Education instead of an elected one.[34] It was considered by many observers that the approval in a November referendum of this amendment was critical to the success of any future reforms. A campaign to adopt the amendment was launched in the summer of 1982.

Concurrently with this effort a special initiative was undertaken by the Governor's office to fine-tune the recommendations of the 1980 committee and to develop a special program that would again be presented to the legislature. A group of professional educational consultants from State Research Associates of Lexington, Kentucky, was employed to put this package to-

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[34] 1982 Miss. Laws ch. 616 (amendment to Miss. Const. § 202).

gether. At the same time, a massive citizen support campaign was organized that would reach a climax just before the November vote on the constitutional amendment. The approval of the amendment was regarded as a signal that the state was serious about educational reform. The results were gratifying, with the amendment being approved by a vote of 219,973 to 203,005.

The stage was now set for action. Despite pleas to hold off until the regular session, the Governor convened a special session to deal solely with education. The major recommendations were based on the findings of the 1980 committee and on the 1982 report of the special consultants. The latter report was the most comprehensive and detailed of any ever undertaken in the state.

While cautioning against an unfair reaction to a lack of educational progress in the state, the report, which was cited by the Governor in his charge to the legislature, pointed out the critical need for improvement. These devastating comparisons dramatized Mississippi's plight at that time:

> Mississippi ranks 45th of 50 states in the amount per capita spent on education.
>
> Mississippi is 49th of 50 states in expenditures per pupil, $600 less per pupil than the national average.
>
> Mississippi's rate of illiteracy at 2.4 percent is twice that of the national average. Louisiana's rate of illiteracy at 2.8 percent is the only state higher.
>
> Mississippi along with Kentucky and West Virginia has the lowest median school years completed. A median of 12.1 years means that just slightly over half the population has completed high school. The national average is 66.6 percent of the population.
>
> Mississippi's average annual salary for instructional staff in public elementary and secondary schools in 1980-81 was $13,017. This is the lowest in the country. The national average was $17,264.
>
> During 1980-81, between 13,000 and 15,000 people dropped out of school. Another 5,000 to 6,000 six-year-olds never started.
>
> Mississippi has the highest reject rate of persons wanting to join the army. Thirty-five percent cannot pass the intelligence

test, compared with 9 percent nationally.[35]

The emphasis of the message was on the economic benefits that would accrue from an improved level of educational achievement. It was estimated, for example, that only 30,000 students had graduated from Mississippi high schools in 1981 from an original 1969 starting class of 54,000. The resultant loss in productive human effort over the lifetime of the class was calculated to be four billion dollars.[36]

With that premise, the recommendations that were included in the Governor's message covered the entire spectrum. The first emphasis was on early childhood education. The testimony was overwhelming from the experience in other states that children who attended preschool programs fared markedly better in school than those who did not. Not only all day kindergarten but a system of teacher aides in the first three grades was recommended in an effort to break the cycle of drop-outs that stemmed from inadequate early teaching efforts.

The evidence in support of these proposals was overwhelming. Using the Lee County School System as a model for the teacher aides program, the report found that first grade students in the system moved in one year from the 23rd percentile, well below the national norm, to the 59th percentile, above the national norm, as a result of the program. For kindergartens the results were even more dramatic.

A second initiative lay in the area of school attendance. The state's historical record in this regard was abysmal. Not only had it been, in 1918, the last state to adopt a compulsory attendance law, but in 1956, under the hysteria that followed the *Brown* decision, it repealed that law. A largely ineffectual attendance statute was enacted in 1977, but there were no penalties for failure to observe it and virtually no resources were made available to encourage its observance. It was urged that an attendance law that placed sanctions on parents or guardians be enacted.

A third significant approach to reform came in the call for greater innovation in teacher preparation, certification and

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[35] Report to the Governor on Education, *vii* (1982).

[36] *Id.*

recertification. There was a specific recommendation for conditional certification of new teachers and for a continuing process of performance based evaluation. Professional development programs for both teachers and administrators were advanced, and an institute for the training of principals was suggested. The concept of accountability was placed in the forefront of school policy.

Under the proposal, the accreditation of schools would be based on compliance with a new and more rigorous set of standards that would include a broadened and more demanding curriculum. The stated objective of the proposed reforms in this area was to establish an accreditation system based on measurable elements related to instructional effectiveness and to provide for state intervention when performance was substandard. The recommendations stopped short of advocating a take-over of a non-performing district by the State Department of Education.

Finally, there was the plea for substantially increased salaries for teachers that would ultimately bring them to the Southeastern average. In any event, it was obvious that additional funding would be required which would involve a major tax increase.

In what has subsequently come to be known as the "Christmas Miracle" of December, 1982, the legislature responded to the call for the massive reforms in an unprecedented way. At no other time in the state's history had there come together so concentrated an effort at revamping the education system. The result was that in two weeks almost all of recommended reforms were enacted into a law that also included provisions for the largest tax increase ever approved in the state.[37]

The passage of the Educational Reform Act[38] presaged a new level of educational priorities for the state. For the first time in the state's history there was put in place a statewide mechanism for the measuring of academic achievement. The performance based system of accreditation has greatly enhanced the capacity of teachers and administrators to appraise the effectiveness of their efforts. The procedures for teacher certifica-

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[37] 1982 MISS. LAWS ch. 17 (extraordinary session).

[38] MISS. CODE ANN. §§ 37-1-1 to -11, §§ 37-3-1 to -49 (Supp. 1988).

tion and personnel appraisal have made it possible for the first time to identify and recognize the most productive individuals. Renewed emphasis on proper teacher preparation formed a major part of the program.

In addition to the formal results, an important collateral development was the raising of the level of expectations which most citizens had about their schools. Instead of accepting mediocrity and in many cases expecting it, the passage of the Education Reform Act caused a new set of standards to be applied to Mississippi education. This led to a realigning of the political agenda with candidates for governor and the legislature attempting to outdo each other in their expression of support for educational improvement. The 1988 session of the legislature dramatically confirmed that trend by enacting the largest increase in educational appropriations ever passed. A specific result was the raising of the state's teacher salary average from 49th in the country to 34th. Thus, the stated goal of the Education Reform Act to reach the Southeastern average was achieved.

A final result of this activity in school reform has been the recognition even though we have come far from the dreary old days of a generation ago, we still have a long way to go to develop the quality programs that will make the state truly competitive. No longer are we willing to stick our heads in the sand and pretend that all is well.

That brings us then to the ultimate question: Where do we go from here? At the risk of oversimplification, it would appear that there are several obvious tasks. They are, in no certain order of priority, as follows:

1. Establish clear lines of accountability for performance in every school district.
2. Maintain salaries at competitive levels.
3. Consolidate small and noncompetitive schools.
4. Reduce the number of drop-outs from the present level.
5. Concentrate on improving the poorest districts with a program of equity funding.
6. Improve the physical facilities at many schools, including air-conditioning classrooms.
7. Reduce to a simple majority the vote necessary to approve a

school bond issue.
8. Develop early intervention programs to reduce the number of at-risk children.
9. Create more remediation opportunities for marginal students.
10. Provide in-school instruction and other services to reduce the number of teen-age pregnancies.
11. Continue the process of broadening the curriculum.

The attainment of these objectives will depend on many factors, not the least of which is the commitment of additional state and local resources. Just as vital, however, is the continuing public interest in improving the manner in which our schools are administered. Some of the smaller high schools are facing critical decisions, as the requirements for a broader and more demanding curriculum become more binding on them. For example the new accreditation standards now call for 25½ credits, exclusive of vocational education courses.

More schools will utilize the new technologies, relying on computers and videodiscs not only for instructional purposes but for the equalizing of education opportunity. These technologies may well provide the basis for small, rural schools to compete equally with the larger institutions. What is certain is that every conceivable scientific advance must be utilized to deliver the quality of instruction that is necessary for more schools to compete.

The organization and management of school districts must continue to undergo scrutiny. One advance on which most professional administrators have long agreed lies in having county superintendents appointed rather than elected. It must be regarded as a set-back for progressive educational administration that in the recent referendum not a single county voted to make that change. While schools should continue to be answerable to the public, the direct political influence that comes as a result of electing county superintendents cannot be regarded as sound.

State Superintendent Richard Boyd, in his report to the people of Mississippi in November, 1987, pointed out the continuing obstacles that we face in the further reforms necessary to bring our educational system to a nationally competitive status. He quoted Arkansas Governor Bill Clinton, a leader for reform in his state, as having said, "In general, everybody is for change;

in particular, very few are for it."[39] It is now time to make those specific adjustments that, like fine-tuning a sophisticated piece of machinery, determine not only how efficiently it can perform but also how effectively it does the job it was created to do.

One of the major emphases in this process must be increased attention to those in the lower rungs of the social and economic scale. It has been observed by more than one authority that Mississippi has gone a long way in developing a competitive system for the top fifty per cent of its students, but has not achieved that result for the lower fifty per cent.

With all of the challenges in front of us and with all of the deficiencies in our educational system that remain to be addressed, it can be said with assurance that there is now in place in Mississippi a fundamental structure that for the first time in our history is capable of producing competitively educated men and women. The fulfillment of that task remains our continuing obligation.

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[39] Boyd, The Mississippi Education Reform Act Five Years Later, at 44 (1987).

DESEGREGATION AND EDUCATION*

*Constance Baker Motley***

Perhaps the best remembered school desegregation case which stemmed from the Supreme Court's 1954 decision outlawing segregation in public educational institutions is the case which opened the University of Mississippi to its Afro-American citizens. It is perhaps fair to say, in retrospect, that "Jim Crow," the unofficial name for the infamous separate but equal doctrine, met its death in Mississippi when James Meredith was finally admitted to the University in 1962, although its funeral is still going on. That seems to be why we are here, 35 years after *Brown*, still talking about school desegregation problems.

Long before suit in the *Meredith* case was filed, Mississippi had joined with other southern states after the *Brown* decision in the South's massive resistance campaign. And a few days before the University of Mississippi case was actually filed, the Freedom Riders arrived in Jackson, Mississippi. Such a direct frontal assault on the southern states' policy of racial segregation which the Freedom Riders represented had not occurred previously in this century in the Deep South. Mississippi's reputation in the area of race relations was such that no one believed that Afro-American citizens in Mississippi would ever have the courage to bring suit to open the University of Mississippi, such as had occurred in every other deep South state by 1961 except

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* This paper represents the introductory remarks presented at "The Civil Rights Movement and the Law — A National Symposium" at the University of Mississippi on April 1, 1989.

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South Carolina. This confluence of the Freedom Riders and the lawsuit to open the University produced a race relations climate in Mississippi that surely must have rivaled the climate in Mississippi prior to the firing on Fort Sumter. Although all the Freedom Riders were non-violent and their mission clearly defined, they were treated as anticipated by the state officials in Mississippi: all were arrested and jailed, high bail was set in each case. Consequently, nobody was surprised that federal force was ultimately required to secure the admission of a single Afro-American student to the University of Mississippi. Mississippi was regarded in early 1960, and prior thereto going back to the end of Reconstruction, as the most racist state because of its treatment of its Afro-American citizens and because of the utterings of some of its more notorious political figures such as Senator Bilbo, who was in the United States Senate for many years as the leading advocate of racial segregation and discrimination. Mississippi was one of the two states in the Union (South Carolina was the other) in which former slaves controlled state government during Reconstruction and in which Afro-Americans constituted a majority of the population after the Civil War. Mississippi had also been left behind in the industrialization process which swept the nation after the Civil War. A largely agricultural society, Mississippi's social and political climate stagnated. It was, therefore, one of the states in which restrictions on the newly freed slaves were the most severe after whites regained control of state government.

When James Meredith's year and a half legal battle came to an end in 1962, the Governor of the state issued a call to all state officials to resist the United States Government's enforcement of the *Brown* decision. This open rebellion against the United States, of course, ultimately led to the sending of federal troops to enforce the Supreme Court's decision. Aside from the question of equal protection for Afro-Americans in the state of Mississippi, the *Meredith* case represented one of the few times since the Civil War that a southern state renounced the authority of the United States. Prior to the *Meredith* case, there was only one other instance in which federal troops were actually required to enforce the Supreme Court's decision, and that was the case of Little Rock, Arkansas, where Governor Faubus' fail-

ure to uphold and enforce the law as required by his oath of office caused a reluctant President Eisenhower to send in federal troops. Again, in retrospect, Eisenhower's decision to send in federal force in the *Little Rock* case saved the *Brown* decision from an ignominious death and made it clear that the national government would send troops to enforce the constitutional rights of Afro-Americans when necessary. Notwithstanding this unequivocal statement of the President's constitutional duty to enforce Supreme Court decisions, Mississippi, through its governor, decided to resist a Supreme Court order. With that decision, we Americans had a constitutional crisis on our hands.

The thing to emphasize in retrospect is that the civil rights movement of the 1950s and 1960s stood on firm federal constitutional ground, which had become a part of the national constitution in the last century, as a result of the movement to abolish slavery and include Afro-Americans in the body politic. In short, the Reconstruction Amendments added a new ideal to those stated in the Constitution. What those amendments did, in effect, was to inculcate in the Constitution the ideal of equality which was set forth in the Declaration of Independence but not the original Constitution or the Bill of Rights. The Declaration of Independence had established the ideological framework for our society, but the framers' ambivalence about slavery and free persons of color had obviously caused a failure to proclaim the equality of all persons as one of our society's basic tenets in the Preamble to the Constitution and/or in the Constitution itself.

One result of the litigation strategy of the civil rights movement of the 1950s and 1960s was to bring the Supreme Court and lower federal courts to center stage in the American community for the first time in this century. The American people, a hundred years removed from the Civil War and about a hundred and fifty years removed from the adoption of the Constitution, were only dimly familiar with the role of the federal judiciary under our Constitution. How the Supreme Court's decisions would be enforced during a constitutional crisis when a state government refused to honor federal authority was also something with which the American people were not well acquainted. *Little Rock* and the *Meredith* case schooled me and my generation of Americans in how the federal government works during a

constitutional crisis of the kind created by state resistance to federal authority. We also now know how wise the framers' of the Constitution were in making federal judges lifetime appointees free from political pressures. Having had these lessons, our present constitutional framework should see us through the twenty-first century.

There are those who argue that the *Brown* decision was a failure because it did not seat every Afro-American child next to a white child in public schools or lift all of the descendants of former slaves out of the poverty status in which most of them were in 1954. But, of course, the *Brown* decision was not intended to change the economic status of blacks overnight or to create a kind of black and white checkerboard in the public school system of every major city. As Thurgood Marshall argued in the Supreme Court, a decision outlawing segregation in public education was necessary so that the process of public school desegregation in this nation could commence. And that is exactly what happened. *Brown* was simply the beginning of a new day. Equal educational opportunities were perceived in 1954 to be the key to our salvation as persons of color. Without a clear Supreme Court statement that racial segregation in public education violated the equal protection clause of the fourteenth amendment to the Constitution, it was argued, the process of bringing Afro-Americans into the mainstream of American life could not begin, particularly in the Deep South where school segregation was decreed by state law or state policy. The *Brown* case was also designed to change national constitutional policy with respect to education. In 1954, the *Brown* case was in line with the historic national policy change represented by President Truman's abolition of segregation in the armed forces in 1948. Segregation in the armed forces during World War II had embarrassed the nation. It had been notice to the whole world that notwithstanding the fourteenth amendment, this was a racist country.

Thirty-five years after *Brown*, and 40 years after the presidential determination to end segregation in the armed forces, we can now see that a significant change has taken place in the nation as a whole with respect to the status of Afro-Americans. We are no longer a racist country as a matter of express national

policy or constitutional law. The *Brown* decision was followed in rapid succession by a series of Supreme Court decisions striking down segregation in all other areas of the public life of the American community. In 1989, many black Americans now live in a totally integrated community from cradle to the grave.

School desegregation will continue to be an issue in our society for the foreseeable future, but apparently without the attention on the national level that it once commanded. School segregation is no longer perceived to be the single most important issue in the black community that it once was simply because the Supreme Court has spoken on the pivotal issue, the Supreme Court's decision has been enforced with the use of federal troops where necessary, and there simply is no real present threat that the *Brown* decision will be reversed by the Supreme Court. How we change the fortunes of those at the bottom of the social and economic ladder in the nation is now at center stage. And, of course, the question involves consideration of the educational opportunities available to those on the first rung of the ladder to first class citizenship. In those American cities where poor blacks are concentrated in the older centers, de facto segregation prevails complicated by poor quality education stemming from the political powerlessness of those involved. Black political empowerment in the major cities and states seems to be a partial answer to how we rid our major cities of ghetto blight. The remainder of the answer may depend on federal financial support. The fact that such school segregation is not amenable to traditional remedies does not mean that the problem should be abandoned. It simply means that thoughtful new approaches must be developed.

There is a tendency on the part of public interest groups today, particularly activists on behalf of the poor, to turn to the courts for the solution of controversial issues which legislative bodies have avoided as in the case of school segregation. Many of these cases have not met with the legal success which civil rights lawyers initially found in resorting to the courts. In my view, the reason for this relative lack of legal success is that there is not such a clear constitutional and legislative basis for their pleas as there was in the case of school desegregation. In the case of the homeless, for example, there are those who advo-

cate that there is some right to be found in the Federal Constitution to be adequately housed. Some state courts have already found such a right in their state constitutions. It is presently difficult to conclude that a claim such as the right to adequate housing can succeed in the courts without a clear constitutional or congressional legislative basis, especially since such a claim has not seriously been made in the first two hundred years of our constitutional history. The homeless condition of so many of our people cries out for solution. The most obvious solution is to be found in a program of federal financial assistance to housing programs where required. Many cities and states will try to solve the problem locally. But to find a right in the Constitution to compel a federal financing solution will be difficult indeed. The ideal of adequate housing for all is akin to the ideal of free public school education for all which developed in the last century and which finally found universal support at both the state and national level.

The legacy of *Brown*, therefore, may well be a realization that the time has come once again to return to the political process to garner support for new societal ideals. We may well need an amendment to the Federal Constitution which will force Congress to appropriate the money to provide a right to basic human needs such as shelter, food, health care, quality public school education and education beyond the public school level. Some states may soon amend their state constitutions to so provide in response to the will of their people. Amendments to the Federal Constitution, of course, must be preceded by a two-thirds majority consensus that each of us would be entitled as members of the American community to these basic needs. The problem of the homeless, which is tugging at the heart strings and purse strings of all of us, may well be the problem around which such a consensus will develop as it did in the last century around the issue of human slavery and free public school education. Governments are created to serve the needs of society. We are the first society to unabashedly proclaim the dignity of the individual and to declare each of us a child of God as we did in our Declaration of Independence.

SEEKING EDUCATIONAL FUNDING EQUITY IN MISSISSIPPI: "I ASKED FOR WATER, YOU GAVE ME GASOLINE"*

*T.H. Freeland, III, T.H. Freeland, IV and Tim F. Wilson***

I. Introduction

The mechanics of school finance and administration — a combination of local, state, and federal funding and governance — has been a matter of public concern since the founding of the federal government. Among the earliest legislation by Congress was the sixteenth section lands grant which provided aid to schools in newly opened western lands.[1] Following immediately upon this grant of aid for schools were complaints about the equity of the aid being given.[2]

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* *See* Tommy Johnson, *Cool Drink of Water Blues* (1929)("I asked for water, she gave me gasoline."); *accord* Chester Burnett a/k/a Howlin' Wolf, Moaning' in the Moonlight (1956).

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[1] The first proposals for disposing of lands west of the original thirteen states also included proposals that one-tenth of the land be set aside for various purposes, including education. *See* B. Hibbard, A History of Public Lands 38 (1924)(discussing 1785 proposal for land disposal with school lands grant). These proposals led in turn to a proposal that the center section of each township—the sixteenth section—be set aside for the support of the schools, a proposal incorporated into the first sixteenth section land grant in the Northwest Land Ordinance of 1785. G. Knight, History and Management of Land Grants for Education in the Northwest Territory 13 (1 Papers of the American Historical Association No. 3, 1885); *see* XXVIII Journals of the Continental Congress 298, 301 (1933)(1785 land ordinance, reserving central section of each township "for the maintenance of the public schools").

[2] In Mississippi, for instance, the federal government began to grant lieu lands as a substitute for sixteenth sections sold in the Chickasaw Cession area after 1836. By 1839, the Mississippi legislature informed Congress that the lieu lands were "wholly worthless and utterly inadequate to the purpose [of supporting schools]." Memorial of February 6, 1839, ch. 62, 1839 Miss. Laws 99, 100. Just as varying local wealth produces disparities in the modern property tax system, varying quality of sixteenth sections produced disparities in the school land grant system.

Issues concerning funding equity arose naturally from the favored method for financing schools: local property taxes. While questions of funding equity arise in several contexts — across racial[3] or other demographic boundaries,[4] or about kinds of education (vocational versus college preparatory, for instance) — an issue of particular recent interest has been geography and funding equity, an issue involving how local funding of education produces disparities between districts. This issue has recurred in the Mississippi legislature throughout the twentieth century. Each time the issue has arisen, the legislature has taken steps that, even at the time, provided only partial solutions.[5] Most recently, in the 1989 term, the Mississippi Legislature passed a "Uniform Millage Assistance Grant" designed to supplement district school funds to the extent those district funds cannot produce the state-wide average in property tax revenues.[6] This article examines the history of the legislature's efforts to deal with equitable funding, as well as potential challenges to inequities in funding.

One element of the funding equity debate has been a question of what should be compared between various districts to decide whether a system is equitable. The focus of this article is on equality of educational opportunity, and not on educational outcomes.[7] The debate over whether education can be an equalizing

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[3] *See* Ayers v. Allain, 674 F. Supp. 1523, 1563-64 (N.D. Miss. 1987)(unsuccessful challenge to funding disparities between Mississippi's predominantly black institutions of higher learning and state's predominantly white institutions).

[4] *See* Kadrmas v. Dickinson Public Schools, 108 S. Ct. 2481, 2484 (1988)(indigent's unsuccessful challenge to fee for bus transportation); Plyler v. Doe, 457 U.S. 202, 230 (1982)(illegal alien's successful challenge to bar free public education for illegal aliens).

[5] *See infra* at text accompanying notes 92-115.

[6] S. 2254, 1989 Miss. Reg. Sess.; *see infra* text accompanying notes 136-147.

[7] There has been a vigorous debate over the effect of educational opportunity on educational outcome, beginning with the Coleman Report, J. COLEMAN, E. CAMPBELL, C. HOBSON, J. MCPARTLAND, A. MOOD, F. WAINFELD & R. YORK, Equality of Educational Opportunity (1966) [hereinafter COLEMAN REPORT]. *See* Hodgson, *Do Schools Make A Difference*, in THE "INEQUALITY" CONTROVERSY: SCHOOLING AND DISTRIBUTIVE JUSTICE 22-44 (1977)(discussing course of this debate). The COLEMAN REPORT, a nation-wide study comparing standardized test results to school facilities, concluded that the "product" of a school system does not vary much with the amount of money spent on the schools. COLEMAN REPORT at 21-22, 322-325. The COLEMAN REPORT has been used by those arguing against claims for funding equity. *See* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 42-43 (1973)(citing COLEMAN REPORT and stating that relation of qual-

force in society at large is not relevant to the debate over whether opportunity within the education system itself should be equalized.[8]

The funds available relate directly to educational quality or opportunity. The money spent on schools has a direct effect on the kind of school available. The funds available dictate the number of books in libraries, the qualification of teachers, the student-teacher ratios, and the availability of equipment such as language labs or computers. In this sense, the amount available per pupil necessarily effects the quality of education available for each pupil.[9] In their work on funding equity, Coons, Clune, and Sugarman make a compelling argument for the relation of cost to quality. They focus on the fact that the educational services available are determined by the funds available.[10] They state:

> Legislators have assumed, the courts have assumed, society has assumed that spending for education in fact purchases some effect worth having and that more spending will purchase more of that effect. Historically, educators, with near unanimity, have asserted a powerful cost-quality relation in education. [A] leader in this field . . . [has] suggested that the cost-quality relation may even be an accelerating one — that the last dollar spent in the district of highest expenditure may be the most productive of all expenditures.[11]

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ity to cost is one of "major sources of controversy" in debates about educational funding); Moynihan, *Equalizing Education: In Whose Benefit?* in THE "INEQUALITY" CONTROVERSY: SCHOOLING AND DISTRIBUTIVE JUSTICE 98-120 (1977)(arguing that COLEMAN REPORT's conclusions weigh against court-ordered equalization of funding).

[8] The fact, if true, that denials of equal educational opportunity do not effect the "product" of an educational system should not of itself undercut an equal protection claim. There is demonstrable injury — discriminatory distribution of government services — regardless of whether the injury affects an outcome such as test scores. The Supreme Court has properly refused to require that, beyond a showing of actual disparities in educational opportunities, there must be a showing of some effect on educational outcomes. *See* Papasan v. Allain, 478 U.S. 265, 288 n.17 (1986)(refusal to find that disparity was harmless).

[9] J. COONS, W. CLUNE AND S. SUGARMAN, PRIVATE WEALTH AND PUBLIC EDUCATION 25 (1970).

[10] *Id.* at 25-33. The equalization proposals of this work are discussed in detail, *infra* at text accompanying notes 72-89.

[11] *Id.* at 27 (citing Mort, *Cost-Quality Relationship in Education*, in PROBLEMS AND ISSUES IN SCHOOL FINANCE 9-10 (1952)).

Following Coons, Clune, and Sugarman, this article discusses "equity" in the same way a school administrator would—in terms of the funds available per student. Part I of this article examines the Supreme Court's equal protection jurisprudence in the area of education with particular focus on the degree to which the federal right to education can be used to achieve equal educational opportunities. Part II examines state constitutional provisions related to education, with particular regard to the Mississippi Constitution and the possibility that education may be a fundamental right under state law. Part III examines the structure of school finance used in Mississippi, its origins, and current efforts to reform school finance.

II. Federal Equal Protection And Education

A central element of the Supreme Court's opinion in *Brown v. Board of Education*[12] was the important role of education in our system:

> [E]ducation is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.[13]

A perennial issue has been whether this language has equal protection consequences outside the desegregation cases. Does this language indicate that education has favored status under the equal protection clause?[14]

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[12] 347 U.S. 483 (1954).

[13] *Id.* at 493.

[14] In equal protection cases concerning education, this language has been consistently quoted in opinions either striking down state restrictions on education or arguing for favored status for education. Kadrmas v. Dickinson Public Schools, 108 S. Ct. 2481,

It is well established that in order to warrant "heightened" review an equal protection challenge either must be premised upon a "fundamental right" or pertain to a "suspect class".[15] The Supreme Court held, in *San Antonio Independent School District v. Rodriguez*[16], that education was not such a "fundamental right" and that educational funding questions did not — without more — involve any "suspect class".[17] The Court, therefore, held that rational basis review was the appropriate standard to apply in education cases. However, the Court appeared to qualify this rejection of heightened review for education in *Plyler v. Doe*[18] in stating that "[S]ome degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence."[19]

In express contradistinction to *Rodriguez*,[20] this holding in *Plyler* gave credence to the notion that, even though education was not itself a "fundamental right," education did influence and directly involve fundamental rights such as freedom of speech and freedom to engage in political activity.[21] The implication resulting from *Plyler* that education might be entitled to some sort of "heightened" scrutiny has been subsequently rejected by the Supreme Court. In *Kadrmas v. Dickinson Public*

2493 (1988)(Marshall, J., dissenting)(quoting *Brown* in arguing for favored status of education); Plyler v. Doe, 457 U.S. 202, 222-23 (1982)(striking down Texas statute which withheld state aid to educate illegal alien children); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 29-30 (1973) (quoting *Brown* in noting importance of education); *Rodriguez*, 411 U.S. at 111 (Marshall, J., dissenting) (quoting *Brown* in arguing for favored status of education); *cf.* Papasan v. Allain, 478 U.S. 265, 284-86 (1986)(remanding for review of disparity in state scheme for distributing school lands income).

[15] *See generally* Comment, *Rational Basis Review Under the Equal Protection Clause — A Double Standard Review* — City of Cleburne, Texas v. Cleburne Living Center, 55 Miss. L.J. 329, 330-337 (1985)(overview of standards of review).

[16] 411 U.S. 1 (1973).

[17] *Id.* at 33-36.

[18] 457 U.S. 202 (1982).

[19] *Id.* at 221 (quoting Wisconsin v. Yoder, 406 U.S. 205, 221 (1972)).

[20] *Rodriguez*, 411 U.S. at 36 (rejecting notion that constitution guarantees "effective" speech or "informed" exercise of franchise).

[21] *Plyler*, 457 U.S. at 221. The Plyler opinion expressly denied that the "heightened" scrutiny employed was because alien school children were involved. *Id.* at 219 n.19. This denial raised expectations that education might be entitled to some form of "heightened" review.

Schools,[22] the Court distinguished *Plyler* from other education contexts by holding that *Plyler* presented "unique circumstances."[23] At least since *Kadrmas*, it seems clear that equal protection cases involving education receive rational basis review.

Equal protection analysis — no matter what the level of scrutiny — requires the Court to analyze thoroughly each facet of the challenged governmental conduct and to consider how such conduct affects the offended citizens. The approach is to require complete articulation of the discrimination and its effects. The thoroughness of the Court's description of the facts relating to the discrimination does not vary with the level of scrutiny (strict/intermediate/low). Rather, differences in the levels of scrutiny determine only how far behind a government's justification for the discrimination the Court will inquire.[24] Low scrutiny will not relieve the Court of the duty to assemble a cogent picture of the discrimination.[25]

Rational basis review is the least stringent form of equal protection analysis. It has been suggested, however, that for some kinds of interests, the Court will require a more rigorous analysis under rational review. This suggestion is based upon recent decisions of the Supreme Court which illustrate that even under rational basis reveiw (low scrutiny) the Court's review of

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[22] 108 S. Ct. 2481 (1988).

[23] *Id.* at 2487-88 (limiting Plyler to its facts for "heightened" review purposes).

[24] *See* City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 435-39, 447-50 (1985)(scrutiny focuses upon proposed "purpose" to be served); Williams v. Vermont, 472 U.S. 11, 22-23 (1985)(same); Zobel v. Williams, 457 U.S. 55, 61-65 (1982)(same).

[25] In Papasan v. Allain, 756 F.2d 1087 (1985), the Fifth Circuit inaccurately assumed that there was, in fact, a uniform state-wide system pertaining to revenues from sixteenth section lands, when there was a bifurcated system dividing the counties in Mississippi into (1) those possessing sixteenth section land (receiving consequent revenues), and (2) those counties without sixteenth section land (receiving no revenues). An initial observation by the Supreme Court was, "To begin with, we disagree with the Court of Appeal's apparent understanding of the crux of the petitioners' claim." Papasan v. Allain, 478 U.S. 265, 286 (1986). The assumption that Mississippi's school lands trust system was facially neutral and that funding differences were accidental was simply factually incorrect. This factual disagreement between the Fifth Circuit and the Supreme Court, as to just what the discrimination challenged consisted of, was a keystone to the Supreme Court's opinion. It would appear, therefore, that at least in the context of educational opportunity the Supreme Court will not allow the lower courts to ride roughshod over the factual circumstances of a challenged discrimination.

equal protection cases will not always be "toothless."[26] When the Court's analysis has "teeth," it is unlike the situation where "purely economic" regulations are at stake and review is so deferential that even specious hypothetical rational bases may be accepted.[27] In the context of educational deprivations, the Supreme Court appears willing to subject proffered "legitimate purposes" to logical analysis.

At least some of the confusion over how rational basis review works in education cases is not the result of "levels of scrutiny" or how the "legitimacy" of a discrimination is supported. Rather, sometimes apparently incompatible opinions are the result of fundamental disagreements within the Court as to what the — ill-defined and non-fundamental — federal right to education embodies. Beginning with *Rodriguez*, the opinions on all sides of this issue have each turned on the writer's implicit assumptions about the content of the right to education, and not on the choice of a level of scrutiny. In *Kadrmas*, Justice O'Connor, for the majority, assumes that it is legitimate to charge a fee for school bus transportation. Proceeding from this assumption, it is her view that she need only rationalize the discriminatory application of the fee solely to "unreorganized"

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[26] *See* Comment, *supra* note 15, at 345-46, 356 (discussing "teeth" in rational basis analysis); *see, e.g.*, *Papasan*, 478 U.S. at 286-92 (nondeferential review finding discrimination in school funding); *City of Cleburne*, 473 U.S. at 447-50 (nondeferential review finding discrimination against the mentally retarded); Hooper v. Bernadillo County Assessor, 472 U.S. 612, 616-23 (1985)(nondeferential review finding discrimination concerning veteran's tax preference); *Williams*, 472 U.S. at 22-27 (nondeferential review finding discrimination in automobile tax credit plan); *Zobel*, 457 U.S. at 61-65 (nondeferential review finding discrimination in tax rebate system); *cf.* New York State Club Ass'n v. City of New York, 108 S. Ct. 2225, 2235-37 (1988)(detailed analysis used to uphold nondiscrimination law from facial invalidity); Banker's Life & Casualty Co. v. Crenshaw, 108 S. Ct. 1645, 1653-54 (1988)(detailed analysis used to uphold facially discriminatory appeal penalty); Lyng v. International Union, 108 S. Ct. 1184, 1192-94 (1988)(detailed analysis used to uphold facially discriminatory denial of food stamps to strikers); Pennell v. City of San Jose, 108 S. Ct. 849, 857-59 (1988)(detailed analysis used to uphold rent control ordinance).

[27] *See, e.g.*, City of New Orleans v. Dukes, 427 U.S. 297, 303-06 (1976)(upholding ordinance on hypothesis that eight-year veterans of pushcart hotdog market will operate more in French Quarter tradition than less-experienced pushcart operators); Williamson v. Lee Optical, 348 U.S 483, 489-91 (1954)(upholding ordinance on hypothesis that "a needless, wasteful requirement"—of prescription by ophthalmologists before optician could replace eyeglasses—served public welfare).

districts:

> The legislature could conceivably have believed that such a policy would serve a legitimate purpose of fulfilling the reasonable expectations of those residing in districts with free busing arrangements imposed by reorganization plans. Because this purpose could have no application to nonreorganized districts, the legislature could just as rationally conclude that those districts should have the option of imposing user fees on those who take advantage of the service they are offered.[28]

The dissent by Justice Marshall, joined by Justice Brennan, proceeds essentially from the premise that "to burden the access of poor persons to an education" in and of itself violates equal protection; in other words, the bus fee itself is unacceptable.[29] Therefore, no analysis of the legitimacy of discriminating between reorganized and unreorganized districts enters into the issue.[30] Justice O'Connor, like the North Dakota Supreme Court, assumes that "transportation is not a necessary element of the educational process."[31] This is an assumption about the content of the federal right to education. This assumption, not methods of rational basis analysis, decided the case.

There is a similar difference of fundamental orientation toward the content of the federal right to education evident in *Papasan v. Allain*[32]. Justice White's majority opinion in *Papasan* assumes that *Rodriguez* means that disparities under a facially-neutral system oriented toward local control of local schools is permissible, whereas, a bifurcated system which knowingly and arbitrarily treats one group of schoolchildren differ-

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[28] *Kadrmas*, 108 S. Ct. at 2491.

[29] *Id.* at 2491-94.

[30] *See id.* The dissent by Justice Stevens, joined by Justice Blackmun, makes no assumption as to whether school bus fees are permissible barriers to education, but rather demonstrates that the purported legitimate purpose of the legislature in discriminatorily imposing such fees is in its own terms self-contradictory—thus not rational and not legitimate. This dissent essentially accuses the majority opinion of lacking "teeth". *Id.* at 2494-95.

[31] Kadrmas v. Dickinson Public Schools, 402 N.W.2d 897, 901 (N.D. 1987). The North Dakota Supreme Court at least concedes, "No one could seriously dispute the logic of the assertion that a child must reach the schoolhouse door was a prerequisite to receiving the educational opportunity offered to them." *Id.*

[32] 478 U.S. 265 (1986).

ently than another is not permissible.[33] Justice Powell, in his dissent, exhibits an entirely different understanding of the meaning of *Rodriguez*. To Justice Powell, *Rodriguez* stands for the proposition that unless funding disparities in the educational context are pronounced, no discrimination of constitutional proportion will be found.[34]

The opinions in *Papasan* and *Kadrmas* illustrate that, depending upon what assumptions are made and upon how the issue is framed, the result of rational basis analysis can differ substantially. These cases demonstrate that before a rational basis analysis is even begun, the tacit assumptions about the content of the ill-defined federal right to education will have defined the issue so that the result achieved is preordained. Therefore, it is perhaps more useful, for predicting the result of educational equal protection claims, to focus upon what the claim presupposes about the content of the ill-defined federal right to education, rather than to focus upon the mechanics of rational basis analysis. Whether the level of review is "heightened", "with teeth", or "deferential" would appear to have far less effect on the outcome of a claim than does the question of how the claim is assumed to be included in, or exclusive of, the federal right to education.

III. The State Constitutions and Education

Given the ill-defined and non-fundamental character of the federal right to education, an alternative basis for educational claims may be state constitutional provisions. Use of such sources has been tried with varying success. In *Serrano v. Priest*,[35] for instance, the California Supreme Court struck down California's school finance scheme.[36] While the case was pending on remand, the United States Supreme Court decided *Rodriguez*, apparently overturning *Serrano*. However, on appeal after remand, the California Supreme Court grounded its grant of re-

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[33] *Papasan*, 478 U.S. at 286-89.

[34] *Id.* at 296, 300-01 (because sixteenth section school lands income amounted to only one and one-half percent of overall school funding disparity was *de minimis*).

[35] 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971)("Serrano I").

[36] *Id.* at 589, 487 P.2d at 1244, 96 Cal. Rptr. at 604.

lief in the state constitution, and once again overturned the state's financing scheme.[37]

Beyond avoiding the mandate of *Rodriguez*, there is one other advantage to basing such a claim on state constitutional grounds. Typically, state constitutions have specific provisions concerning education. Mississippi is typical in this sense, although Mississippi's education provisions acquired some unusual language in the 1950s and 1960s.[38]

Evaluation of claims based on provisions in state constitutions requires examination both of the appropriate standard for evaluating claims of unconstitutionality, and of the specific guarantees, if any, concerning education. While the Mississippi Constitution has no equal protection clause, the Mississippi Supreme Court has repeatedly used equal protection analysis in reviewing statutes under the state's due process clause. The court has stated that the test for whether a statute involving economic regulation violates the due process clause of the state constitution is whether the statute "has no reasonable relation to any proper government purpose."[39]

Mississippi is not alone in following a rule that the guarantee of due process carries with it an equal protection-like guarantee. At the same time as *Brown*, the Supreme Court held that segregation also violated fifth amendment due process.[40] Since then, the Supreme Court has held that a single method of analysis is to be performed for fifth amendment due process and fourteenth amendment equal protection.[41]

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[37] Serrano v. Priest, 18 Cal. 3d 728, 775-76, 557 P.2d 929, 957-58, 135 Cal. Rptr. 345, 373-74, *cert. denied*, 432 U.S. 907 (1977)("Serrano II").

[38] *See infra* notes 52-53 and accompanying text.

[39] Craig v. North Miss. Community Hosp., 206 Miss. 11, 39, 39 So. 2d 523, 528 (1949) (quoting Albritton v. City of Winona, 181 Miss. 75, 97, 178 So. 799, 804 (1938)). The state due process clause is MISS. CONST. art. 3 § 4.

[40] Bolling v. Sharpe, 347 U.S. 497, 500 (1954).

[41] Shapiro v. Thompson, 394 U.S. 618, 641-42 (1969); *see* Weinberger v. Wiesenfeld, 420 U.S. 636 n.2 (1975) ("This Court's approach to Fifth Amendment equal protection has always been precisely the same as to equal protection claims under the Fourteenth Amendment."). Thus, rational basis review is identical under either amendment. *Compare* Dandridge v. Williams, 397 U.S. 471, 483-86 (1970)(fourteenth amendment rational basis review applied in upholding state welfare benefits scheme) *with* Richardson v. Belcher, 404 U.S. 78, 78-84 (1971)(fifth amendment rational basis review applied in upholding federal welfare benefits scheme).

Due process analysis of economic regulation under the Mississippi Constitution mirrors traditional rational basis review, examining whether a statute has a reasonable relation to a government purpose.[42] In *Albritton v. City of Winona*,[43] the Mississippi Supreme Court stated that courts have "expanded [due process] beyond its literal meaning of 'due procedure' and brought within it substantive as well as procedural rights."[44] In only one case has the Mississippi Supreme Court overturned a statute following this analysis, holding a statute governing insurance agents unconstitutional in *Saucier v. Life & Casualty Co.*[45] The court held that this statute "has no relation to the end or object for the accomplishment of which this statute was enacted, or to any other imaginable legitimate legislative end."[46] The court specifically referred to the due process provisions of both the federal and state constitutions in making this ruling.[47]

The due process/equal protection analysis followed by the Mississippi Supreme Court might provide a strong line of attack if education had the status of a constitutional right under Mississippi's constitution. If education presents a fundamental right or interest, then statutes conferring unequal benefits might well be subject to greater scrutiny than ordinary educational benefits.[48] State-law based challenges since *Rodriguez* have usually

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[42] *See* Mississippi State Tax Comm'n v. Flora Drug Co., 167 Miss. 1, 19, 148 So. 373, 376 (1933).

[43] 181 Miss. 75, 178 So. 799, *appeal dismissed*, 303 U.S. 627 (1938).

[44] *Id.* at 96-97, 178 So. at 802-03 (citing *Flora Drug Co.*). *Albritton* and *Flora Drug* both involved challenges based on federal and state due process. *Albritton*, 181 Miss. at 92, 178 So. at 801; *Flora Drug Co.*, 167 Miss. at 15-17, 148 So. at 375. Both use the same test. *Albritton*, 181 Miss. at 95, 178 So. at 804; *Flora Drug Co.*, 167 Miss. at 19, 148 So. at 376. Both involve a mixture of federal and state cases. *Albritton*, 181 Miss. at 95-97, 178 So. at 803-04; *Flora Drug Co.*, 167 Miss. at 23-29, 148 So. at 377-79.

[45] 189 Miss. 693, 198 So. 625 (1940). The legislature had passed a statute that, in effect, converted special agents of insurance companies into general agents, binding the companies as to any changes in coverage the agents made, regardless of the terms of the policies or the limits on the agents' authority placed by the company. *Id.* at 699-700, 198 So. at 627. In holding this statute unconstitutional, the court, noting that the purpose of the statute was to supervise insurance companies and their agents, held that the act could not rationally serve such a purpose. *Id.* at 705, 198 So. at 625.

[46] *Id.*

[47] *Id.*

[48] For cases using fundamental rights analysis to overturn state finance schemes, see *infra* note 56. For cases refusing to find education a fundamental right, see *infra* note 49.

failed because the state court refused to hold education a fundamental right.[49] The Mississippi Supreme Court, in *Clinton Municipal Separate School District v. Byrd*,[50] recognized a fundamental right to a minimally adequate education. Recognizing that there may be no such federally-created right, the court held that such a right was fundamental under Mississippi law, regardless of its status under the federal constitution.[51] *Byrd* looks to statutory provisions for its finding of a fundamental right.

The Mississippi Constitution itself also indicates the importance of education. The Mississippi Constitution of 1890 had im-

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A few state courts have refused to view this question in terms of fundamental rights, with varying results. In Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273, 282, *cert. denied*, 414 U.S. 976 (1973), the New Jersey Supreme Court refused to find education to be a fundamental right because the court viewed the question of fundamental rights to be unhelpful in equal protection analysis. The court proposed an equal protection analysis that involved weighing the nature of the restraint involved against the apparent public justification. *Id.* at 282. However, because of the implications for other local government services, the court did not decide the case on equal protection grounds. *Id.* at 283-87. Ultimately, the court struck down the state's school finance scheme under the state constitutional requirement of a "thorough and efficient system of free public schools." *Id.* Following *Robinson* in its criticism of fundamental rights analysis, courts in Idaho and Oregon have upheld state financing schemes. Thompson v. Engelking, 96 Idaho 793, 537 P.2d 635, 645 (1975)(using rational basis review to uphold scheme); Olsen v. State, 276 Or. 9, 554 P.2d 139, 144-145 (1976)(using *Robinson* weighing test to uphold scheme). In Dupree v. Alma School District No. 30, 279 Ark. 340, 651 S.W.2d 90, 90-95 (1983), the Arkansas Supreme Court applied rational basis review in striking down Arkansas' school finance scheme without reaching the question of whether education involves a fundamental right.

[49] Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005, 1017 (Colo. 1982)(challenge to state finance scheme, based on state equal protection, rejected because education is not fundamental right); McDaniel v. Thomas, 248 Ga. 632, 285 S.E.2d 156, 167 (1981)(same); Hornbeck v. Somerset County Bd. of Educ., 458 A.2d 758, 768 (Md. Ct. App. 1983)(same); East Jackson Public Schools v. Michigan, 133 Mich. App. 132, 348 N.W.2d 303, 305 (1984)(same); Board of Educ. v. Walter, 58 Ohio St. 2d 368, 390 N.E.2d 813, 819 (1979)(same); Fair School Fin. Council of Okla., Inc. v. Oklahoma, 746 P.2d 1135, 1147 (Okl. 1987)(same); Board of Educ. v. Nyquist, 57 N.Y.2d 27, 439 N.E.2d 359, 366 (1982)(same). At least two states do not fit this pattern. In Shofstall v. Hollins, 110 Ariz. 88, 515 P.2d 590, 592-593 (1973), the court found education a fundamental right under the state constitution, yet rejected the plaintiffs' claims, finding that the education scheme still had to meet only rational basis review. In Buse v. Smith, 74 Wis.2d 550, 247 N.W.2d 141, 149 (1976), the court found that there was a fundamental right to an equal education, but held that the state constitution did not mandate "absolute uniformity," and, therefore, rejected the challenge to the school finance scheme.

[50] 477 So. 2d 237, 240 (Miss. 1985).

[51] *Id.* (distinguishing *Rodriguez*); *see* Warren County Bd. of Educ. v. Wilkinson, 500 So. 2d 455, 459 (Miss. 1986)(following *Byrd*).

posed upon the legislature a "duty . . . to encourage by all suitable means, the promotion of intellectual, scientific, moral and agricultural improvement, by establishing a uniform system of free public schools . . . for all children between the ages of five and twenty-one years . . . ."[52] The provision has been weakened somewhat; language making the provision discretionary was added in 1960, when Mississippi was attempting to avoid school desegregation.[53] The provision has been seen as requiring the legislature to provide access to a school for each child.[54] Even in weakened form, this provision has been seen as granting a right to an education.[55]

The conclusion that education involves a fundamental right has been an essential first step in several state cases striking down educational financing schemes.[56] Construing language similar to that in the Mississippi Constitution, courts in Califor-

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[52] MISS. CONST. art. 8, § 201 (1890, amended 1960). This provision originated in the 1869 constitution and the reconstruction era emphasis on establishing a state system of education. *See* MISS. CONST. of 1869, art. VIII, § 1 (requiring legislature to establish system of free public schools).

[53] MISS. CONST. art. 8, § 201. The 1960 amendment was designed to assure the legislature of a free hand in fighting the mandate of *Brown*, a matter much in the mind of the legislature at the time. *See* Act of April 27, 1960, ch. 316, §§ 1, 9, 1960 Miss. Laws 462, 462, 467 (allowing local boards to close schools and transfer students out of districts in order to maintain "public peace, order or tranquility").

[54] Myers v. Board of Supervisors, 156 Miss. 251, 262, 122 So. 718, 721 (1929).

[55] In Jackson v. Franklin County School Board, 806 F.2d 623, 630 n.11 (5th Cir. 1986), a case under the Education of Handicapped Children Act, the court stated that the child involved had a "right" to an education, citing, in part, MISS. CONST. art. 8, § 201 and MISS. CODE ANN. § 37-13-1 (1972).

[56] *See* Serrano v. Priest, 18 Cal. 3d 728, 765-66, 557 P.2d 929, 951, 135 Cal.Rptr. 345, 366-67 (1976)("Serrano II")(holding education "fundamental right" in striking down education finance scheme); Horton v. Meskill, 172 Conn. 615, 376 A.2d 359, 373, 374-75 (1977)("Horton I")(same); Pauley v. Kelly, 162 W.Va. 672, 255 S.E.2d 859, 878 (1979)(same); Washakie County School Dist. Number One v. Herschler, 606 P.2d 310, 330 (Wyo.), *cert. denied*, 449 U.S. 224 (1980)(same). By contrast, in the states whose courts have affirmed their finance scheme, only the Arizona and Wisconsin courts have held education a fundamental right. *See* Shofstall v. Hollins, 110 Ariz. 88, 515 P.2d 590, 592-593 (1973)(holding education a fundamental right, yet refusing to strike down state scheme); *see supra* note 49 (state cases refusing either to hold education fundamental right or strike down state scheme); Buse v. Smith, 74 Wis. 2d 550, 247 N.W.2d 141, 149 (1976)(same). *But see* Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273, 282, 295-98 (refusal to hold education fundamental right but striking state scheme on other grounds), *cert. denied*, 414 U.S. 976 (1973).

nia,[57] Connecticut,[58] West Virginia,[59] and Wyoming[60] have held that education involved fundamental rights. In California[61] and Connecticut,[62] this holding led to an application of strict scrutiny and the striking down of the state's financing scheme. In West Virginia[63] and Wyoming[64] the holding led to a requirement of a compelling state interest to justify the classification. Since it is generally acknowledged that the test under "strict scrutiny" is whether a "compelling state interest" is served, it would appear that the strength of the right to education in the foregoing states is equivalent.[65]

The Mississippi Supreme Court has shown a willingness to accord education the status of a fundamental right under state law. This willingness is supported by the state constitution's specific guarantees concerning education. If the Mississippi Supreme Court accepts such an argument in a case challenging funding disparities, then the court must demand more than a rational basis to justify the state's division of the state into rich and poor districts. More stringent review would provide considerable force in a challenge to funding disparities.[66]

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[57] *Serrano II*, 18 Cal. 3d at 765-66, 557 P.2d at 951, 135 Cal. Rptr. at 367.

[58] *Horton I*, 172 Conn. 615, 376 A.2d at 373-74.

[59] *Pauley*, 255 S.E.2d at 878.

[60] *Washakie County*, 606 P.2d at 333.

[61] *Serrano II*, 18 Cal. 3d at 765-66, 557 P.2d at 951, 135 Cal. Rptr. at 367.

[62] *Horton I*, 172 Conn. 615, 376 A.2d at 373. The court in *Horton I* did note that, because of the nature of school financing legislation, the court must do more "weighing" than is ordinary in traditional strict scrutiny analysis. *Horton I*, 172 Conn. 615, 376 A.2d at 374; *see* Horton v. Meskill, 195 Conn. 24, 486 A.2d 1099, 1105 (1985)("Horton II")(court concluded that it should eschew "formalistic reliance on the usual standards of the law of equal protection" in performing analysis); Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273, 282 (1973)(noting that court analyzing school finance legislation must avoid "[m]echanical approaches" and must weigh denial against public justifications).

[63] *Pauley*, 255 S.E.2d at 878.

[64] *Washakie County*, 606 P.2d at 335.

[65] *See* Comment, *supra* note 15, at 331 & n.15 (citing Palmore v. Sidoti, 466 U.S. 429, 433 (1984) and Shapiro v. Thompson, 394 U.S. 618, 638 (1969) for equation of "compelling state interest" with "strict scrutiny").

[66] Challenges based on rational basis review alone should still be considered in spite of *Rodriguez* and the state cases cited in note 49. In Dupree v. Alma School District No. 30, 651 S.W.2d 90, 93-95 (1983), the Arkansas Supreme Court struck down the state's finance system as being irrational without reaching higher scrutiny or the question of whether education involved a fundamental right.

IV. The Structure of School Finance

A. The Foundation Plan

Under the minimum foundation program or foundation plan of school finances, the state sets a dollar level foundation of per-pupil spending guaranteed for each district. To qualify for the funds, districts must tax at a certain minimum property tax rate.[67] Any district that, taxing at the minimum level, fails to generate the "foundation" amount for each student, is given state funding to make up the difference.[68] This system—through inherent flaws and inadequacies in implementation— has resulted in gross inequalities in school funding.[69]

The foundation plan was the paradigm for school finance between the 1920s and the 1960s,[70] but during the sixties, efforts toward reform began in both state legislatures and the courts.[71] The reform efforts in the courts raised a broad range of equal protection challenges to foundation plan funding.[72] Prior to 1952, Mississippi had gradually moved toward foundation plan funding in efforts to resolve funding inequities. These cases all took as their touchstone the emphasis in *Brown* on education as "perhaps the most important function of state and local government".[73] After the first of these challenges failed,[74] Coons, Clune, and Sugarman, in *Private Wealth and Public Education*,

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[67] S. Coons, W. Clune & S. Sugarman, *supra* note 9, at 64-65.

[68] Henke, *Financing Public Schools in California: The Aftermath of* Serrano v. Priest *and Proposition 13*, 21 U.S.F. L. Rev. 1, 3 (1986).

[69] J. Coons, W. Clune & S. Sugarman, *supra* note 9, at 63-72; *see infra* text accompanying notes 120-135 (discussing inequities in Mississippi's version of foundation plan funding).

[70] Prior to the advent of the foundation plan, proposals for state aid to education centered around various kinds of flat grants. For instance, Ellwood P. Cubberley, a pioneer in school finance theory, proposed a flat grant based on the number of teachers and other educational effort expended by the schools. *See* J. Coons, W. Clune & S. Sugarman, *supra* note 9, at 52-55 (discussing Cubberley's work).

[71] *Id.* at 64; Henke, *supra* note 68, at 3.

[72] *See* J. Coons, W. Clune & S. Sugarman, *supra* note 9, at 294-305 (discussing theories underlying court challenges).

[73] Brown v. Board of Educ., 347 U.S. 483, 493.

[74] *See* McInnis v. Shapiro, 293 F.Supp. 327, 332-36 (N.D. Ill. 1968), *aff'd mem. sub nom.* McInnis v. Ogilview, 394 U.S. 322 (1969)(rejecting equal protection challenge to Illinois version of foundation plan); *see generally*, Henke, *supra* note 68, at 9 (describing *McInnis* and history of challenges to foundation plan funding).

attempted to build a framework for future arguments. Beyond their legal analysis—an attempt to demonstrate the unconstitutionality of funding disparities created by minimum program funding[75] — they described a proposal termed "Power Equalizing" designed to cure the disparity.[76] The purpose was to put all school districts on equal footing, so that the same tax rate would produce the same funds per pupil, regardless of a district's wealth.[77] The state equalization fund would compensate for any shortfall resulting from the local property values.[78] A district would still be able to decide the level of per pupil funding; the equalization mechanism would tell the local district the tax rate necessary to produce that per pupil amount.[79] The equalization mechanism would assure that equal effort (tax rates) would produce equal effect (per pupil funding).[80] In making this proposal, the authors recognized that the distribution of political power made true power equalizing unlikely;[81] for that reason, they built an equal protection argument aimed toward achieving a court-ordered mandate for equalization.[82]

In *Rodriguez*, the United States Supreme Court stated that one problem with recognizing the equal projection challenge was the question of appropriate relief. The Court then discussed a somewhat confused version of power equalizing. The Court stated that power equalizing involved taking away property tax funds from wealthier districts to subsidize poorer districts.[83] However, Coons, Clune, and Sugarman specifically proposed that local districts be allowed to set their taxes and keep their

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[75] J. COONS, W. CLUNE & S. SUGARMAN, *supra* note 9, at 394-433.

[76] *Id.*

[77] *Id.* at 202.

[78] *Id.* at 154-167, 201-203. The authors described how "percentage equalization", a system already in use in some states to achieve partial equalization, could be used to achieve complete equalization. *Id.* at 163. The mathematics are fairly simple. A key district must be selected. *Id.* at 165. To achieve full equalization without equalizing down, the key district must be the richest district. *Id.* at 165-66. The amount of state aid is a ratio, local wealth divided by key district wealth. *Id.* at 166.

[79] *Id.* at 203.

[80] *Id.*

[81] *Id.* at 202.

[82] *Id.* at 203.

[83] *Rodriguez*, 411 U.S. at 41 n.85.

tax proceeds.[84] Equalization would be through a state grant, not redistribution.[85]

Coons, Clune, and Sugarman recognized that the courts were not the ideal forum for crafting remedies to funding equity claims.[86] They pointed out the limited ability of courts — as opposed to legislatures — to propose specific solutions to funding inequity. This limited ability suggests respective roles for the courts and the legislatures in these cases: once a declaration of unconstitutionality occurred, the legislature should enact remedies that in turn would be tested in the courts. This has been the process followed by the states whose financing schemes have been struck down.[87] This is similar to the process that was used by the Fifth Circuit in school desegregation cases. After finding a school system segregated, the courts required the school to formulate a plan for desegregation; the plan was required to meet specific court-ordered guidelines.[88] In states that have struck down their educational finance schemes, the courts have followed essentially this process.[89]

The process in the states that struck down state schemes has led in the direction of power equalizing. California called its scheme "Power Equalizing".[90] The Connecticut and Arkansas remedies are in basic outlines quite similar to the California

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[84] J. Coons, W. Clune & S. Sugarman, *supra* note 9, at 202-03.

[85] *Id.* at 203.

[86] *Id.* at 293-94.

[87] New Jersey was the first state court to choose this route. *See* Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273, 276, 298, (holding state scheme unconstitutional and delaying enforcement to give legislature opportunity to enact remedy), *cert. denied*, 414 U.S. 976 (1973). Similarly, the Connecticut scheme was struck down in Horton v. Meskill, 172 Conn. 615, 376 A.2d 359, 375 (1977) ("Horton I"). The remedy was reviewed in Horton v. Meskill, 195 Conn. 24, 486 A.2d 1099, 1107 (1985) ("Horton II"). In California, there were three reported decisions: Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971) ("Serrano I"); Serrano v. Priest, 18 Cal.3d 728, 135 Cal.Rptr. 345, 557 P.2d 929 (1976)(*Serrano II*); and Serrano v. Priest, 181 Cal.App.3d 584, 226 Cal. Rptr. 584 (1986)(*Serrano III*).

[88] *See* Singleton v. Jackson Mun. Sep. School Dist., 419 F.2d 1211, 1217-22 (5th Cir.)(setting forth process of desegregation), *rev'd in part*, 425 F.2d 1211 (1970); *see also* F. Read & L. McGough, Let Them Be Judged: The Judicial Integration of the Deep South 432-436, 495-498 (1978)(discussing history of these cases).

[89] *See supra* note 87.

[90] *Serrano III*, 181 Cal. App. 3d 584, 226 Cal. Rptr. at 592.

remedy.[91] Once a decision has been made to truly equalize school financing, some form of power equalizing is probably inevitable. Any other method would involve reducing the funds for wealthier—and usually more politically powerful—districts to raise the level of funding in the poorer districts.

B. Mississippi Under the Foundation Plan

Since 1952, Mississippi's state contribution to education has centered around the minimum program fund, an unalloyed version of foundation plan funding.[92] Prior to 1952, Mississippi had gradually moved toward foundation plan funding in efforts to resolve funding inequities. State contributions for education had begun with the common school fund, established during reconstruction.[93] Local contributions were to be primarily from property taxes. By the period immediately after the passage of the 1890 Constitution, the largest percentage of school funding consisted of state aid in the form of the per-capita distributed common school fund. In the mid-1890s, local contributions only amounted to fourteen percent.[94]

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[91] *Horton II*, 195 Conn. 24, 486 A.2d at 1101 n.2 (describing Connecticut's remedy); ARK. STAT. ANN. § 6-20-301 to -319 (1987 & Supp. 1987)(remedial statute enacted in Arkansas). New Jersey has chosen a different method. The state legislature created a complex remedy that involves per pupil full funding for certain programs, need-justified grants from state agencies, plus property tax subsidies to bring districts with sub-average property values up to average. *Robinson*, 69 N.J. 449, 355 A.2d at 136-137. Mississippi's most recent venture into equalization bears similarity to the last aspect of this remedy. *See infra* text accompanying notes 136-47 (describing 1989 act). However, the New Jersey act involved a complex series of other remedies, and a requirement that the state bear responsibilities for equal funding state-wide.

[92] The minimum program fund is established by MISS. CODE ANN. § 37-19-1 to -53 (Supp. 1988). *See infra* text accompanying notes 116-119 (describing current version of minimum program fund).

[93] *See* MISS. CONST. of 1868, art. VII, § 6 (establishing common school fund); W. HARRIS, THE DAY OF THE CARPETBAGGER 315 (1978)(describing origins of common school fund); E. MAYES, HISTORY OF EDUCATION IN MISSISSIPPI 283 (1899)(same). Local property taxes to support education began in the 1840's. *See id.* at 278-279 (discussing origins of property tax for financing education); Act of March 4, 1846, ch. 2, 1844 Miss. Laws 9 (act establishing local schools in Mississippi, providing financing through local property taxes).

[94] S. NOBEL, FORTY YEARS OF THE PUBLIC SCHOOLS IN MISSISSIPPI 79-91 (1918). Per pupil distribution led to complaints of inequity in distribution. The provision did not provide for lower contributions for black students, yet all districts spent less on blacks. This allowed predominantly black areas an advantage in educating their white students

The 1890 Constitution mandated a four-month term and per-pupil appropriation, requirements that led to the preeminent school funding issue between 1920 and 1940: how to use state funds to equalize the length of school terms state-wide? In 1912, the legislature attempted to supplement the common fund by providing that any county with insufficient funding to provide a four month term was to apply to the state board of education, which was to evaluate the application and "apportion [the supplemental] fund in accordance with the needs of the respective counties."[95] The following year, the supreme court held this statute unconstitutional because it did not follow the constitutionally-mandated per-pupil method for funding the minimum four months of school.[96]

In 1922, the legislature provided a fund to equalize school terms and salaries.[97] The fund was to be distributed by the state board of education "in such a manner as to equalize public school terms as nearly as possible throughout the state."[98] The act provided that it was not to take into account locally available funds. This effort to equalize state educational benefits was also challenged. Because this equalization fund was supplemental to the four month common fund, the court held that the constitutional requirement of per-pupil distribution did not apply.[99]

The funds provided under the 1922 act were distributed at the discretion of the state board of education, which based its distribution on need and actual tax effort.[100] In his 1929 report, the state superintendent of education indicated that the distribution method had become based upon local ability to generate taxes rather than the actual local effort. The distribution was to the counties based on "proportion of their need, their ability to

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by depriving black schools of funding and using the funds in white schools. *Id.* at 92-95.

[95] Act of March 6, 1912, ch. 5, § 2, 1912 Miss. Laws 6, 6-7; *see* State Bd. of Educ. v. Pridgen, 106 Miss. 219, 234, 63 So. 416, 418 (1913)(striking statute down as unconstitutional).

[96] *Pridgen*, 106 Miss. at 234, 673 So. at 418.

[97] Act of March 13, 1922, ch. 21, § 2, 1922 Miss. Laws 27, 27-28.

[98] *Id.* at 28.

[99] Miller v. State, 130 Miss. 564, 585, 94 So. 706, 709-710 (1923); *see* Hamiel v. Rice, 176 Miss. 462, 470-71, 169 So. 687, 689 (1936)(rejecting a similar challenge).

[100] *See* BIENNIAL REPORT AND RECOMMENDATIONS OF THE STATE SUPERINTENDENT OF PUBLIC EDUCATION 74 (1927)(describing how fund was distributed).

help themselves and their willingness to do their part."[101] This is similar to foundation plan funding—a county's ability to participate in the equalization fund was based on its ability to tax. By 1936-1937, the board was distributing the fund based on true foundation plan funding. To participate in the equalizing, the state board of education required a county to tax at the rate of fifteen mills.[102]

By 1936, the legislature recognized that the state's "equalizing fund" did not approach equalization of educational opportunity in Mississippi.[103] A report of a joint legislative special committee, appointed to examine the financial needs of the state's schools, noted that sixty-five percent of the white children in the state lived in counties containing only one-third of the state's taxable wealth.[104] These counties relied heavily on the state's equalization fund, yet, paying considerably lower teacher's salaries, were still in large part unable to maintain full terms of school.[105] The local funds available, combined with these counties' state funds (including the equalizing fund), still fell short of the amount necessary to provide a full school term for these counties.[106] Taxing at almost twice the rate of the counties wealthy enough to fund a full term without state funds,[107] these counties still could not provide teacher's salaries or other school expenditures comparable to that of the rest of the state, even at

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[101] BIENNIAL REPORT AND RECOMMENDATIONS OF THE STATE SUPERINTENDENT OF PUBLIC EDUCATION 9 (1929). This method was used for distribution until 1936. *See* BIENNIAL REPORT AND RECOMMENDATIONS OF THE STATE SUPERINTENDENT OF PUBLIC EDUCATION 11 (1935)(similar description of distribution); BIENNIAL REPORT AND RECOMMENDATIONS OF THE STATE SUPERINTENDENT OF PUBLIC EDUCATION 53 (1937)(same).

[102] MISSISSIPPI JOINT LEGISLATIVE COMM., 1936 2d EXTRAORDINARY SESS., REPORT OF SCHOOL SURVEY COMM. OF THE MISSISSIPPI LEGISLATURE 883 (1936) [hereinafter SCHOOL SURVEY REPORT].

[103] *Id.* at 873-85 (report analyzing inequalities in school programs between districts). The report ignored the problem of equalizing expenditures for black children.

[104] *Id.* at 881. The 1936 report makes it clear that the disparities in property values in Mississippi were longstanding. By contrast, the Court in *Rodriguez* stated that disparities in Texas arose in more recent times. *See Rodriguez*, 411 U.S. at 7-8 ("Until recent times, [in] Texas. . .population and property wealth were spread relatively evenly across the State.").

[105] SCHOOL SURVEY REPORT, *supra* note 102, at 875-78, 882-83, 887.

[106] *Id.* at 887.

[107] Of the 19 counties that did not need equalization, only Warren taxed at higher than six mils. *Id.* at 873.

the proposed rate of increased state contribution and increased local taxes.[108]

In response to this report, the legislature codified the foundation method of distributing the equalizing fund.[109] Counties with insufficient funds to operate school for eight months a year were required to tax at ten mills to participate in the equalization fund.[110] A county that failed to participate at ten mills had its equalization funds reduced proportionately.[111]

At the special term of the legislature in 1953, the state adopted the minimum program in the form that, with some minor alterations, exists at present.[112] The bill set up a method for determining the cost of the minimum program, established the minimum ad valorem tax effort, and established a method for calculating the state contribution for the minimum program.[113] At the same time, the legislature established a State Educational Finance Commission and passed a bill providing for state aid for the construction of school facilities. The aid was distributed by the finance commission.[114] The bill establishing the commission

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[108] *Id.* at 882. The fallacy of "local control" as a rationale for foundation plan funding is highlighted by Mississippi's initial implementation. The counties that needed equalization funds were taxing at a rate comparable to the rest of the state, yet were forced to almost double their tax rate to continue to participate. *See id.* at 872-73 (stating that counties using equalization fund would have to almost double their tax rates to continue to participate). The legislation passed in response to the 1936 report limited local control even further for those counties that participated in the fund. They were allowed to spend no more for teacher salaries and transportation than authorized by regulations of the state board of education. Act of December 4, 1936, ch. 1, § 14, 1936 Miss. Laws 7, 13 (2d extraordinary session).

[109] Act of December 4, 1936, ch. 1, 1936 Miss. Laws 7 (2d extraordinary session); *see* SCHOOL SURVEY REPORT, *supra* note 102, at 885-87 (setting forth recommendations). At the same time, the legislature substantially reworked the statutes governing local school administration. Act of March 25, 1936, ch. 255, 1936 Miss. Laws 494 (regular session).

[110] Act of December 1, 1936, ch. 1, § 3(a), 1936 Miss. Laws 7 (2d extraordinary session).

[111] Act of December 4, 1936, ch. 1, §§ 3(c), 4, 1936 Miss. Laws 7.

[112] Minimum Program of Education Act, ch. 14, 1953 Miss. Laws 45; *see* MISS. CODE ANN. §§ 37-19-1 to -53 (Supp. 1988)(current version of minimum program).

[113] Minimum Program of Education Act, ch. 14, §§ 2-5, 1953 Miss. Laws 45.

[114] Act of December 28, 1953, ch. 11, 1953 Miss. Laws 19 (finance commission); Act of December 28, 1953, ch. 13, 1953 Miss. Laws 33 (construction aid). The 1953 special term was much occupied with education matters. *E.g.* Act of December 28, 1953, ch. 10, 1953 Miss. Laws 14 (establishing county boards of education); Act of December 28, 1953, ch. 16, 1953 Miss. Laws 70 (providing for meetings of school boards); Act of December

stated that:

> [E]quality of educational opportunity with respect to instructional personnel, school buildings and facilities, transportation facilities, curriculum and all other school facilities should be provided all such children, that the burden of providing such equality of educational opportunity can no longer be borne entirely by the local taxing units, and, therefore, that a program of state aid therefor should be instituted. The legislature, therefore, declares and determines that the maintenance of the uniform system of free public schools to insure and provide substantial equality of educational opportunity is the joint responsibility of the State of Mississippi and the local taxing units thereof.[115]

The commission had no specific powers to enable it to achieve this goal.

The state's "minimum education program," in its present form is described by statute in terms of, first, a formula for calculation of teacher units (or the actual number of teachers, if less than the number produced by the teacher unit formula),[116] and a minimum salary scale.[117] The statute also provides for additional allotments for administration, support, and transporta-

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28, 1953, ch. 12, 1953 Miss. Laws 24 (providing for school district consolidation and reorganization); Act of December 28, 1953, ch. 23, 1953 Miss. Laws 107 (same); Act of December 22, 1953, ch. 25, 1953 Miss. Laws 116 (same); Act of December 28, 1953, ch. 15, 1953 Miss. Laws 59 (revision of laws concerning bus transportation); Act of December 28, 1953, ch. 18, 1953 Miss. Laws 84 (same); Act of December 28, 1953, ch. 17, 1953 Miss. Laws 78 (establishing process for classifying school districts); Act of December 28, 1953, ch. 19, 1953 Miss. Laws 88 (revising statutes governing the powers and duties of county superintendents of education); Act of December 28, 1953, ch. 20, 1953 Miss. Laws 94 (establishing the method for contracting with personnel); Act of December 3, 1953, ch. 21, 1953, Miss. Laws 104 (providing for auditing and accounts of schools); Act of December 15, 1953, ch. 22, 1953 Miss. Laws 105 (same); Act of December 22, 1953, ch. 24, 1953 Miss. Laws 114 (providing for keeping permanent school records); Act of December 28, 1953, ch. 26, 1953 Miss. Laws 118 (providing for a uniform system of grades and curriculum); Act of December 28, 1953, ch. 27, 1953 Miss. Laws 122 (revisioning statutes on lengths of terms and average daily attendance); Act of December 28, 1953, ch. 30, 1953 Miss. Laws 137 (regulating school debt); Act of December 9, 1953, ch. 31, 1953 Miss. Laws 141 (same); Act of November 17, 1953, ch. 37, 1953 Miss. Laws 146 (same).

[115] Act of December 15, 1953, ch. 11, § 1, 1953 Miss. Laws 19, 19 (codified at MISS. CODE ANN. § 37-45-1 (1972)).

[116] MISS. CODE ANN. § 37-19-5(1) (Supp. 1988).

[117] *Id.* § 37-19-7 (Supp. 1988).

tion.[118] To obtain the minimum program funding, a district has to achieve the minimum local and ad valorem effort established by statutory formula.[119]

Minimum program funding has not come close to assuring an equitable state-wide level of funding. For the 1986-1987 school year, the minimum program "assured" that each school system would have $1,308.70 per pupil.[120] This figure does not relate to the amount any county spent per pupil. The average county spent $2,494.89; even the poorest county, George County, spent $1,920.83.[121] Mississippi's "foundation" sets a floor far lower than any county actually spends.

The disparity in Mississippi's minimum program goes back to within ten years of the legislative enactment of the minimum program. A 1961 report on education to the Legislature's Education Study Committee found that, "The local financial ability to support schools is largely determined by [the] amount of real and personal property per pupil in the district."[122] The report concluded that the ability to finance schools was a factor of local wealth.

The irrationality of the disparities in funding between districts becomes stark when wealthy — often suburban — districts are compared to nearby or adjoining poor — often rural or blue-collar —districts. These disparities can invariably be traced back to disparities in property values. For instance, Long Beach and Pass Christian are neighboring towns. Their school districts adjoin.[123] Yet Pass Christian ranks third in state-wide funding per pupil and Long Beach 96th.[124] Pass Christian's higher tax base[125]

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[118] *Id.*

[119] *Id.* § 37-19-35 (Supp. 1988).

[120] This is the cost of the minimum program for 1986-87 ($619,729,997) divided by the state-wide average daily attendance (473,544). *See* STATE SUPERINTENDENT OF PUBLIC EDUCATION, REPORT TO THE LEGISLATURE OF MISSISSIPPI of 1988 at 8, 27 (1988) [hereinafter 1988 REPORT] (state-wide minimum program cost and average daily attendance figures).

[121] *Id.* at 73-75.

[122] 1 REPORTS OF ADVISORY STUDY GROUPS, PUBLIC EDUCATION IN MISSISSIPPI 314 (1961). Some of the irrationality pointed out by this 1961 report has been dealt with by the state-wide real property reappraisal mandated by State Tax Commission v. Fondren, 387 So. 2d 712, 721 (Miss. 1980), *cert. denied*, 450 U.S. 1040 (1981).

[123] 1988 REPORT, *supra* note 120, at 73.

[124] *Id.* at 73. The millage and income figures in the 1988 report are for the 1986-87

allows it to spend a third again more than Long Beach,[126] while taxing at only three-fourths the millage of Long Beach.[127]

Two districts in Bolivar County, Bolivar #2 and Bolivar #6, show similar disparities. Bolivar #2 has over six times the wealth per pupil of Bolivar #6.[128] Yet taxing at about a third the rate of Bolivar #6,[129] Bolivar #2 is able to spend fifty percent more per pupil than Bolivar #6.[130] This disparity is between Bolivar County's only district with a significant white student population, #2, and a district in the southern part of the county, #6, which is almost exclusively black.[131]

Lee County presents a large urban/rural disparity. The Tupelo Municipal School District generates $685.82 per pupil from local property taxes; Lee County generates only $199.48.[132] This allows Lee County to spend only eighty percent of the amount per pupil that Tupelo spends.[133]

In each of these counties, the higher per-pupil spending is accompanied by far higher per-pupil property values. The disparities are a direct function of local property values, a factor completely outside the control of local school boards. The disparities occur in spite of efforts by the poorer local boards to even the disparities by taxing at a higher rate. The disparities are therefore not a function of "local control" by local boards.

This highlights the great irony — and the falsity — of a central rationale for *Rodriguez*. The Court saw the need for "lo-

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school year. *Id.* at 61-66.

[125] Pass Christian ranks first in assessed value of property per pupil, while Long Beach ranks forty-fourth. *Id.* at 80.

[126] Pass Christian spends $3,348.61 per pupil, while Long Beach spends $2,254.19. *Id.* at 73.

[127] Pass Christian taxes at 30.5 mills, Long Beach at 44.10. *Id.* at 65.

[128] Bolivar #2 has $30,741.89 in assessed property per student, while Bolivar #6 has $4,917.75. *Id.* at 79.

[129] Bolivar #2 taxes at 14.4 mills; Bolivar #6 at 46.63 mills. *Id.* at 63.

[130] Bolivar #2 spends $3,745.20 per pupil; Bolivar #6 spends $2,379.98 per pupil. *Id.* at 73.

[131] *See* BUREAU OF CENSUS, BOLIVAR CONSOLIDATED SCHOOL DISTRICT NO. 2, at 6 (CENSUS OF POPULATION AND HOUSING 1980: SUMMARY TAPE FILE 3E MISSISSIPPI, 1982); BUREAU OF CENSUS, BOLIVAR CONSOLIDATED SCHOOL DISTRICT NO. 6, at 6 (CENSUS OF POPULATION AND HOUSING 1980: SUMMARY TAPE FILE 3F, MISSISSIPPI, 1982).

[132] *Id.* at 80.

[133] Tupelo spends $2,597.6 per pupil, while Lee County spends $2,127.05. *Id.* at 74.

cal control" of school funding as a rationale for foundation plan funding.[134] Yet under foundation plan funding, local wealth, a factor totally uncontrollable by local boards, determines the level of spending a board can achieve. Lee County's school board does not "control" its status as poorer than the Tupelo Municipal School District. It has no control over its lesser ability to generate school funding.[135]

At the 1989 term of legislature, a proposal passed that purported to end some of the disparity in funding. Instead of using the "Power Equalizing" approach, keying all state-wide funding on one district, this bill set up a fund that purported to assure that no district would be able to fund at a rate lower than average.[136] The Act states that its purpose is that "each student counted in average daily attendance in the public schools in Mississippi will have equal access to funds generated by a uniform minimum school district ad valorem levy."[137] The bill has the apparent goal of assuring that any district that cannot meet the state average is given additional state funds from the Uniform Millage Assistance Grant to bring the district up to just below the state average.[138] The bill provides for equalization grants tied to a property tax millage rate. The rate is set at four mills less than state average until 1993, after which the 1993 average is to be used.[139] After 1993, when the figure is no longer tied to the current averages, the "equity" provided by the bill will decrease as state averages change.[140] At four mills less than

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[134] San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 53 (1973).

[135] Unintentionally ironic arguments recurred and were rejected in *Papasan*. The state officials argued that "local control" justified their denial to thirty-nine school districts of any participation in income from the school lands. Papasan v. Allain, 478 U.S. 265, 271 (1986). The state officials did not explain how local boards might "control" lands they did not own. *Id.*

[136] S. 2254, 1989 Miss. Reg. Sess.

[137] *Id.* § 1. The Act also has a separate provision, designed to encourage school consolidation, that provides funding of $36 per pupil for any county consisting of one school district. *Id.* § 1(3).

[138] *Id.* § 1(2)-(4).

[139] *Id.* § 1(2)(c).

[140] The version of the bill that had passed the Senate had simply set the grant at 25 mills. S. 2254, 1989 Miss. Reg. Sess. § 1 (as passed by Senate). Using figures from 1986-87, this would have been very close to four mills less than the state average of 29 mills. *See* 1988 REPORT, *supra* note 120, at 61-66 (listing the millage figures for all 158

state average, this bill will provide $71.70 less per student than the average county obtains per student from property taxes.[141]

The Act's grant calculation begins with calculation of state-wide total revenue from certain property taxes at the state average less four mills.[142] This figure is then divided by the state-wide average daily attendance to produce a state-wide per pupil average.[143] Each district's property tax "goal" is calculated as their average daily attendance multiplied by the state-wide per pupil average.[144] The Act purports to raise to this goal any district whose actual property taxes at the established millage rate fall short.[145] The stated goal of the Act is to bring the poorest districts up only to just short of average; the Act will close some of the existing gap but will leave in place much of the disparity between the richest and poorest districts.

The Act has "tricks" built into its formula that reduce its ability to equalize funding. The Act requires the state to subtract sixteenth section land income, including Chickasaw School Fund appropriations by the legislature.[146] A wealthy school district (with higher-than-average property tax revenues) will also have higher-than-average sixteenth section land revenues. It gets to keep both. Yet the sub-average districts (with likely sub-average sixteenth section land revenues) are pulled back from the "average" revenues promised by the Act. The Act also subtracts interest on surplus funds, severance taxes, Grand Gulf income, TVA in-lieu revenues, and national forest revenues.[147] The formula established by the Act, already designed to fall well short of average, is made even less equitable by these subtractions.

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districts).

[141] *See* 1988 REPORT, *supra* note 120 at 11, 26 (tax revenue and average daily attendance figures).

[142] S. 2254, 1989 Miss. Reg. Sess. § 1(2)(b).

[143] This figure was called the "maximum yield at 25 mills" in the Senate version and the "maximum yield at the uniform minimum school district ad valorem tax levy" in the House and final version. *Id.*§ 1(1)(b)(as passed by Senate); *id.* § 1(2)(c) (as amended by House); *id.* § 1(2)(c) (as passed).

[144] *Id.* § 1(2)(d)-(e) (as passed).

[145] *Id.* § 1(2)(f) (as passed).

[146] *Id.* § 1(2)(g) (as passed).

[147] *Id.* (as passed).

IV. Conclusion

Prior to the 1989 act, Mississippi's scheme for school finance centered around its version of the foundation plan, which is substantially identical to the scheme challenged in *Rodriguez*. While the 1989 act removes some of the disparities inherent in Mississippi's version of the foundation plan, it still leaves substantial disparities in place. The 1989 act does not abandon foundation plan financing; it just sets a new, floating foundation at the state average. There will still be a class of schools stuck at the bottom—those receiving subsidies under the 1989 act—and another class of wealthier schools that have substantially greater funds available. Because the 1989 act presents a change in degree only, and leaves in place the distinctions between wealthier and poorer districts, the 1989 act should not remove any vulnerability to constitutional challenge inherent in Mississippi's financing scheme.

Because Mississippi's financing scheme bears great resemblance to the Texas scheme upheld in *Rodriguez*, a federal equal protection challenge to the scheme would most likely fail. However, *Rodriguez* is not invincible. It seemed clear to the Fifth Circuit that *Rodriguez* completely foreclosed the challenge to state distribution of sixteenth section lands income in *Papasan*.[148] In reversing the Fifth Circuit, the Supreme Court distinguished *Rodriguez* with apparent ease.[149] Nevertheless, it would seem difficult to sustain a federal equal protection challenge to Mississippi's school finance scheme, and would require a creatively designed claim.

There is support for a challenge based on the state constitution. Mississippi's due process clause provides guarantees much like those provided by the equal protection clause of the fourteenth amendment. Where ordinary economic regulation has been involved, the Mississippi Supreme Court subjects that regulation to rational basis review. However, the Mississippi Supreme Court has stated that education is a fundamental right in Mississippi. If the Mississippi Supreme Court follows this state-

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[148] Papasan v. Allain, 756 F.2d 1087, 1095 (5th Cir. 1985).

[149] *Papasan*, 478 U.S. at 265; *see supra* note 25, 32-34 and accompanying text.

ment through to its logical consequences, it may well follow the lead of other states that view education as a fundamental right and require the state to substantially justify distinctions drawn in the area of education. If the Mississippi Supreme Court adopts this view, then a state constitutional challenge to Mississippi's education finance scheme should prevail.

THE HISTORY AND FUTURE OF SOVEREIGN IMMUNITY FOR MISSISSIPPI SCHOOL DISTRICTS

Owen T. Palmer, Jr.

I. Introduction

For more than a hundred years, school districts in Mississippi enjoyed the royal treatment following the theory that "the King can do no wrong."[1] Over the years, absolute immunity for school districts was eroded by specific state and federal legislative exceptions[2]; but general immunity as to usual tort actions remained intact in Mississippi until the Mississippi Supreme Court's historic decision in *Pruett v. City of Rosedale.*[3] The State of Mississippi, its political subdivisions and agencies, and its municipalities and their agencies were all included in the broad scope of the court's decision.[4] Prior to *Pruett*, only scattered attacks on the shield of sovereign immunity had reached the Mississippi Supreme Court.[5] Mississippi had remained one of the few states which continued to recognize the broad doc-

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[1] *See* Pruett v. City of Rosedale, 421 So. 2d 1046, 1047 (Miss. 1982) (outlining history of sovereign immunity in United States).

[2] *See, e.g.*, Brown v. Wichita State Univ., 540 P.2d 66, 78 (Kan. 1975) (municipalities immune in performance of governmental function).

[3] 421 So. 2d 1046 (Miss. 1982).

[4] *Pruett*, 421 So. 2d. at 1052.

[5] *See generally* Owens v. Jackson Mun. Sep. School Dist., 264 So. 2d 892, 892 (Miss. 1972) (held state and subdivisions immune from suit in tort actions); Harrell v. City of Jackson, 229 Miss. 815, 92 So. 2d 240, 244 (1957) (school board protected by sovereign immunity and held not liable for property damages); Fernwood Rural Sep. School Dist., 170 Miss. 35, 154 So. 268, 269 (1934) (absent statutory authority, rural school district held immune from suit); Nabors v. Holly Bluff Consol. School Dist., 135 Miss. 608, 100 So. 177, 177 (1924) (governmental subdivisions such as school districts held protected from suit by sovereign immunity); Ayres v. Board of Trustees of Leake County Agricul. High School, 134 Miss. 363, 98 So. 847, 850 (1924) (state and governmental subdivision held immune from suit in breach of contract action against agricultural school).

trine of sovereign immunity for school districts.[6] In *Pruett*, the Mississippi Supreme Court refused to abrogate sovereign immunity either retroactively or currently.[7] The court did, however, unanimously provide a future window of immunity which, for a time, would leave the question of continuation of sovereign immunity to the state legislature.[8]

For those observers in 1982 who thought that all forms of sovereign immunity soon would pass into oblivion, Mark Twain's comment that "the news of my death has been greatly exaggerated" was most applicable to subsequent occurrences. Since 1982 the question of how to deal with the court's decision has been debated, not only in the halls of the state legislature, but also in corporate board rooms, union halls, and chambers of city, county and school authorities. The debate has been swept along with the general tide of tort reform. This article will focus on the following aspects of sovereign immunity in Mississippi:

1) the protection of sovereign immunity which school districts have enjoyed in matters of tort litigation;

2) several of the exceptions to the doctrine which have been adopted by federal and state legislation;

3) state legislation which has been enacted in response to the mandate of the Mississippi Supreme Court; and

4) the role of the State Fiscal Management Board in assisting Mississippi school districts in facing the challenge of sovereign immunity.

II. School Districts Protected by the Doctrine of Sovereign Immunity

Because public education in Mississippi has historically

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[6] *See* "A Word On . . .", Office of the General Counsel of the National School Boards Association (Aug. 1988) (table listing state-by-state statutory tort liability waivers of school district sovereign immunity) (attached as Appendix I); Miss. Code Ann. § 11-46-5(1) (Supp. 1987) (doctrine of sovereign immunity extended in Mississippi until October 1, 1989).

[7] *Pruett*, 421 So. 2d at 1052. The court recognized that if sovereign immunity was immediately abolished, the state and the local subdivisions would not have sufficient time to make the necessary preparations to deal with the potential liability. *Id.*

[8] *Id.* The court delayed the effective date of its opinion until July 1, 1984, in order to allow at least two sessions of the state legislature to consider any conditions or problems incident to the abrogation of sovereign immunity. *Id.*

been considered an exclusively governmental function,[9] few attorneys for injured plaintiffs have tested the appellate waters to challenge sovereign immunity as enjoyed by Mississippi school districts. Prior to 1982 only a handful of cases reached the appellate court system for an interpretation of the issue.[10] Before the adoption of the Mississippi Rules of Civil Procedure in 1982, an attorney for the defendant-school district usually responded to the plaintiff's declaration with a general demurrer which was sustained with no appeal in most instances.[11] After the adoption of the Mississippi Rules, Rule 12(b)(6) or 12(c) defenses provided the same purpose as a general demurrer, either of which could be considered before a trial on the merits of the case.[12]

The few cases perfected for appeal on the issue of sovereign immunity have been disposed of rather summarily by the Mississippi Supreme Court with brief, and in some instances, unnecessarily confusing language. For example, Justice Gillespie, in a very brief opinion,[13] stated:

> The excellent briefs filed in this case present the question whether this Court should overrule its former decisions holding the State and its subdivisions immune from suit in tort actions except (1) *in matters concerning proprietary affairs* and (2) where immunity has been abrogated by statute. We had the same question presented earlier in this term and without written opinion rejected the argument that sovereign immunity should be abrogated. A careful study of the arguments has again been made, and we affirm our former decisions.[14]

In recent years, particularly in larger school districts, extra-

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[9] B. Anderson, The Law and the Teacher in Mississippi: A Guide for Teachers, Administrators, and Potential Teachers 11 (1975). The rationale of this doctrine is derived from the tenth amendment to the United States Constitution which allocates to the states those powers not delegated to the federal government. The tenth amendment thus has been interpreted as giving the states control of education. *Id.*

[10] *See supra* note 5.

[11] *See, e.g., Ayres*, 134 Miss. 363, 98 So. at 847 (demurrer of defendant board of trustees sustained and suit dismissed since no statute authorized suits against agricultural high schools).

[12] *See* Miss. R. Civ. P. 12(b)(6) (1988) (motion for failure to state claim upon which relief may be granted); Miss. R. Civ. P. 12(c) (1988) (motion for judgment on pleadings).

[13] *Owens*, 264 So. 2d at 892.

[14] *Id.* (emphasis added).

curricular activities and special projects have been viewed as extending the mission of education far beyond the usual "reading, writing and arithmetic." Questions have been raised whether such activities are "proprietary" in nature, and if so, whether school districts retain sovereign immunity.[15]

The Gulfport Municipal Separate School District faced the problem of interpreting the scope of "proprietary affairs" in *Boyd v. Gulfport Municipal Separate School District*.[16] At a junior high school football game where an admission price was charged, a junior high school student sustained injuries after becoming embroiled in a fight with another group of students on the unlighted stadium parking lot.[17] Suit was filed on the student's behalf in the United States District Court for the Southern District of Mississippi seeking actual damages in the amount of $500,000 and punitive damages in the amount of $500,000.[18] Although the district judge sustained the defendant's motion for summary judgment, the opinion left in doubt the issue of whether the district might be liable for what the plaintiff alleged to be "proprietary activities."[19] Not only did the unsuccessful appeal by the plaintiff to the United States Court of Appeals for the Fifth Circuit answer this issue succinctly, but the reported decision also clearly summarized the history, both legal and fac-

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[15] *Id.* Since the decision excepted matters concerning proprietary affairs, this area was left open for basing a challenge upon sovereign immunity. *Id.*

[16] 821 F.2d 308 (5th Cir. 1987).

[17] *Boyd*, 821 F.2d at 309. The plaintiff claimed that the school district was negligent in failing to provide a reasonably safe place from which to depart the stadium. *Id.*

[18] Boyd v. Gulfport Mun. Sep. School Sys., No. S85-1363(R), slip op. at 1 (S.D. Miss. May 15, 1986) (mem.).

[19] *Id.* at 11. Judge Russell stated: "Therefore, the question is whether the defendant school district was acting in a governmental capacity exercising governmental functions, or in a private, proprietary capacity at the incident." *Id.* (citing *Owens*, 264 So. 2d at 892). Judge Russell also noted that "[t]here is no Mississippi case law deciding the question of whether the operation of a stadium by a school district for extra-curricular activities constitutes a governmental function or a proprietary function." *Boyd*, No. S85-1363 (R), slip op. at 10-11 (S.D. Miss. May 15, 1986). Judge Russell resolved the issue conclusively by stating that:

> [E]ach of the above cited cases have followed a similar rationale; that extracurricular activities are educational in nature, for the benefit of the student and thus governmental. The court is of the opinion that the Mississippi court, even in light of *Pruett*, would hold similarly to the above line of cases.

Id. at 14-15.

tual, of the right of school districts in Mississippi to invoke the protection of sovereign immunity for all tort claims with no applicable statutory exception.[20]

Two questions faced the Gulfport school district in responding to appellant's claims: whether since the incident occurred subsequent to the *Pruett* decision, the defendant-school district was shielded by the window of immunity provided by that case,[21] and whether the nomenclature used in the designation of municipal school districts, as well as the statutory law providing substantial financing of these districts by the municipalities, created a casual impression that municipal districts might be agencies of municipalities and thus liable for torts committed in the course of proprietary activities.[22] The appellant-plaintiff in *Boyd* based his argument regarding the latter questions on the language in *Owens v. Jackson Municipal Separate School District* that school districts could be involved in proprietary activities, and, therefore, not entitled to the protection of sovereign immunity for those activities.[23]

At the time of the appeal of the *Boyd* case, the doctrine of sovereign immunity had few supporters on the federal bench. Fortunately, the panel recognized the problems associated with abrogating sovereign immunity immediately, as well as the need to provide relief during the transition period.[24] The *Boyd* court stated:

> Of course, the courts, as well as the legislature, have the undoubted right to abrogate the doctrine of sovereign immunity. We are of the opinion, however, that the legislature is in a better position to limit and restrict claims that can be asserted and to provide the ways and means for paying of such claims (either by taxation or appropriation), if it should see fit to do

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[20] *Boyd*, 821 F.2d at 309-11.

[21] *See Pruett*, 421 So. 2d at 1052 (court realized that immediate abolition of sovereign immunity would catch state and municipal governments unprepared).

[22] *Boyd*, 821 F.2d at 309-10. The court noted that although in many states school districts derive their immunity from the immunity of the municipality, Mississippi has consistently recognized school districts as agencies of the state and not of the municipality. *Id.*

[23] *See supra* note 13 and accompanying text.

[24] *Boyd*, 821 F.2d at 311.

> so. Therefore, we decline to abolish the doctrine of governmental immunity at this time by judicial decision.
>
> Abrogation of sovereign immunity strongly appeals to the sentiments of us all, but, if it were done as sought by the appellant, it would leave every state agency, institution or branch of government vulnerable to tort suits. We think abrogation, if ever accomplished, should be accomplished by legislation alluded to by Justice Robertson in *Berry v. Hinds County*. . . .[25]

Thus, the opinion in *Boyd* emphatically reiterated that sovereign immunity would not be abrogated and that all school districts in Mississippi were agencies of the state, not of the municipality.[26]

Therefore, since 1986, subject only to implementation of legislation mandated by *Pruett*, the right of Mississippi school districts to rely upon the doctrine of sovereign immunity in the usual tort case has been conclusively settled both in state and federal jurisdictions. It is immaterial whether the activities of a Mississippi school district are classified as purely governmental or perhaps partially proprietary. All school districts, whether municipal, municipal separate, consolidated, or other, are agencies of the State of Mississippi and thus generally immune from tort claims, subject to certain exceptions.[27]

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[25] *Id.* (quoting Jones v. Knight, 373 So. 2d 254, 256-57 (Miss. 1979)).

[26] *Boyd*, 821 F.2d at 309-10. An earlier decision by the United States District Court for the Southern District of Mississippi unequivocally gave judicial certainty to the fact that all school districts were agencies of the state and not of the municipalities. Stevens v. Brookhaven Mun. Sep. School Dist., 5 F. Supp. 629, 629 (S.D. Miss. 1934).

[27] MISS. CONST. art. VIII, § 201 states "[t]he legislature may, in its decision, provide for the maintenance and establishment of free public schools for all children between the ages of six (6) and twenty-one (21) years, by taxation or otherwise, and with such grades, as the legislature may prescribe." *Id.* Pursuant to the constitutional authority contained in that article, the legislature has from time to time enacted legislation dealing with school districts and their boards of trustees. In 1986, the Mississippi legislature adopted what is now referred to as the Mississippi Uniform School Law, which effectively codified the authority, duties, and responsibilities imposed upon school districts and their boards of trustees. Mississippi Uniform School Law, 1986 Miss. Laws ch. 492 (codified as amended at MISS. CODE ANN. §§ 37-7-301 to -333 (Supp. 1988)).

III. State and Federal Actions Which Have Eroded the Doctrine of Absolute Sovereign Immunity

A. The Accident Contingency Fund

Until the 1950s, no remedies were available to pupils or the public for injuries sustained because of negligence of school personnel. In the Extraordinary Session of the Mississippi Legislature in 1953, the legislature established the Accident Contingency Fund, which was then codified as section 63-36-19 of the Mississippi Code of 1942.[28] This legislation authorized claims asserted by *pupils only* who might be injured as a result of negligence by school employees operating school buses.[29] The initial law covered only county school districts and those municipal separate school districts with added territory outside the boundaries of the municipalities.[30] The maximum coverage available through the Accident Contingency Fund was set at:

> . . . the total amount of five thousand dollars ($5000.00) exclusive of court costs for any one child sustaining such injuries or damages, and provided further that no such claim shall be paid from any other fund other than the accident contingency fund as hereinabove provided.[31]

Chapter 394 of the General Laws of 1964 extended the coverage of the Accident Contingency Fund to include damages to *any person* and/or damage to property resulting from negligent acts of school employees in operating a bus or other vehicle used for transportation of students.[32] The limits of liability were also increased to $5,000 per person, $50,000 per accident, $500 for property damage, and $250 for hospital and medical expenses

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[28] Accident Contingency Fund Act, 1953 Miss. Laws ch. 15 (codified as amended at Miss. Code Ann. § 37-41-41 (Supp. 1988)).

[29] *Id.* § 18(a). Section 18(a) of the Act gave a cause of action to any school pupil injured by the negligent operation of any county or municipal separate school district school bus or other vehicle. *Id.*

[30] *Id.* § 2.

[31] *Id.* § 18(d).

[32] 1964 Miss. Laws ch. 394 (codified as amended at Miss. Code Ann. § 37-41-41 (Supp. 1988)). Chapter 394 amended § 18(a) to extend coverage to any person injured or property damaged by the negligent operation of any county or municipal separate school district school bus or other vehicle. *Id.* § 18(a).

per person per accident.[33] In 1982, subsection 15 of section 37-41-41 was amended to increase the maximum limits of recovery.[34]

Until 1978 the statutes creating the Accident Contingency Fund applied only to county school districts and those municipal separate school districts with added territory.[35] In the case of the municipal separate school district, the protection extended only to those buses and other vehicles transporting students who resided in the added territory and whose attendance center was located more than one mile from the student's residence.[36]

The statutes enacted in 1984 in response to *Pruett* provided that the law creating the Accident Contingency Fund would terminate upon the date of abrogation of sovereign immunity, with any surplus funds being paid into the "Tort Claims Fund."[37] Since the date for the abrogation of sovereign immunity has been extended from year to year by the legislature, the Accident Contingency Fund has remained basically unchanged, awaiting its demise along with the other vestiges of sovereign immunity in

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[33] *Id.* § 18(d).

[34] See 1982 Miss. Laws ch. 354 (codified as amended at MISS. CODE ANN. § 37-41-41 (Supp. 1988) (liability limits set at $10,000 per person, $50,000 per accident, $1,000 for property damage, and $1,000 for medical expenses).

[35] 1953 Miss. Laws ch. 15 (codified as amended at MISS. CODE ANN. § 37-41-41 (Supp. 1988). For example, the 1953 Accident Contingency Fund Act applied only to county boards of education and boards of trustees of municipal separate school district with added territory outside of the municipal corporate limits, while specifically excepting municipal separate school districts. *Id.*

[36] *Id.* In 1978, several municipal separate school districts within the state joined in a suit in the United States District Court for the Northern District of Mississippi alleging that MISS. CODE ANN. 31-41-3 (1972), which authorized reimbursements to districts furnishing transportation to students, failed to include reimbursement for students residing within municipalities, therefore, violating the equal protection clause of the fourteenth amendment of the United States Constitution. Johnson v. Summer, 488 F. Supp. 83, 84 (N.D. Miss. 1980). The school districts also alleged that excluding the protection of the Accident Contingency Fund to such students was discriminatory. *Id.* While the state legislature was in session in 1978, Judge Orma Smith submitted a bench opinion holding that the existing statute violated the equal protection provisions of the Constitution and discriminated against the residents of the municipalities. *Id.* As a result of this decision, the legislature enacted Chapter 483 of the General Laws of 1978 to extend reimbursement for transportation to all school districts within the state. 1978 Miss. Laws ch. 483 (codified as amended at MISS. CODE ANN. § 37-41-3 (Supp. 1988)).

[37] 1973 Miss. Laws ch. 477 (codified as amended at MISS. CODE ANN. § 37-7-304 (Supp. 1988)).

Mississippi.

B. Authority of School District to Acquire Liability Insurance

In 1973, another potential inroad was made upon the doctrine of absolute sovereign immunity in vehicular cases. Chapter 477 of the General Laws of 1973 afforded school districts the option to purchase liability insurance on its various vehicles, other than school buses, and excess liability insurance on buses operated by the district.[38] Despite the added costs, a number of school districts have taken advantage of this authority. The rationale of those districts and their trustees is that the employees, students, and the general public have a basic right to protection in excess of the minimum limits and restrictions upon liability afforded by the Accident Contingency Fund.

With the erosion of sovereign immunity by both state and federal legislation, teachers, administrators, and trustees have been exposed to considerable personal liability arising out of nonpersonal injury litigation. Districts have sought additional protection for their trustees and employees. Chapter 355 of the General Laws of 1974 gave to all school districts the authority to purchase liability insurance to provide that additional protection.[39] Because teachers and administrators in some instances have liability insurance through their professional organizations, the policies available to school districts provide that such coverage for administrators and teachers is secondary and/or in excess of the policies which this group may have secured either individually or through other sources. The two companies which have made such policies available to school districts have been St. Paul Fire and Marine and National Union Fire Insurance. More than half of the school districts in the country have obtained coverage from the latter company since the policy it offers is reasonably broad. These policies usually do not protect the trustees and other employees from claims arising out of personal injuries. The present coverage (perhaps somewhat modified) as afforded

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[38] *Id.*

[39] 1974 Miss. Laws ch. 355 (codified as amended at MISS. CODE ANN. § 37-7-319 (Supp. 1988)).

by these particular liability policies will probably remain available to districts even if the school districts adopt the plan offered by the State Fiscal Management Board, discussed hereinafter.

C. *School Employment Procedures Act*

For many years the legislature has been inundated with demands by teachers and administrators for tenure based upon statutory authority. The response was the adoption in 1974 of the School Employment Procedures Act (SEPA).[40] Although the act avoids the question of tenure, it does provide a very strict procedure of review when contracts of administrators and teachers are not renewed.[41] Prior to the adoption of SEPA, there were no statutes which afforded any procedural protection to teachers and administrators whose contracts were not renewed. Sovereign immunity provided the necessary defense in an action against a school district unless brought under the legal authority of certain federal acts.

Since the effective date of SEPA, many school districts have incurred considerable expenses, both for hearing costs and attorney's fees in defending actions involving nonrenewal of contracts. A few districts have sustained substantial damages because of failure to follow the strict procedural schedule outlined by SEPA or because nonrenewal of the contract was based on a constitutional or statutory violation of the rights of teachers or administrators.[42] SEPA served to remove from districts who may have violated the provisions of that act the right to assert sovereign immunity.

D. *Workers Compensation*

For many years, school districts have enjoyed the option of

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[40] School Employment Procedures Act, MISS. CODE ANN. § 37-9-101 to -113 (1988).

[41] *See* MISS. CODE ANN. § 37-9-105 (Supp. 1988) (requiring school district to give written notice of non-renewal of employment contract within seven days of decision not to re-employ); MISS. CODE ANN. § 37-9-109 (Supp. 1988) (outlining rights to which employee is entitled upon written request).

[42] *See* Claiborne County Bd. of Educ. v. Martin, 500 So. 2d 981, 985 (Miss. 1986) (new contract with back pay ordered when contract not renewed because of political activities).

covering their employees under the Workers' Compensation Act.[43] Because school districts and their trustees considered themselves immune from lawsuits by employees who might be injured during the course of employment and because of local financial restraints, most school districts did not take advantage of this option. In recent years, however, demands by teachers and other employees for some protection from job-related injuries have resulted in a scattered number of districts throughout the state securing workers' compensation coverage. The prospective loss of the protection of sovereign immunity has resulted in the amendment of section 71-3-5 of the Mississippi Code to require that after October 1, 1989, any political subdivision, as defined in section 11-46-1,[44] "shall come under the provision of the Workers' Compensation law."[45] Section 37-7-303 provides that two or more public school districts may enter into agreements to purchase their workers' compensation coverage with a single policy of insurance through a carrier authorized to insure such liability in this state.[46] Purchase of contracts must be selected after competitive bids.[47]

E. Limitation on the Defense of Sovereign Immunity under Federal Legislation

Since the 1960s, Mississippi school districts have seen the protection of sovereign immunity with regard to certain claims eroded by federal legislation. With the enactment of the various

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[43] MISS. CODE ANN. § 71-3-5 (Supp. 1988). Section 71-3-5 states, in part, that "[a]ny state agency, state institution, state department, or subdivision thereof, including counties and municipalities or the singular thereof,. . . may elect, . . . to come within [the provisions of the Workers' Compensation Law]." *Id.*; *see* Adams v. Petal Mun. Sep. School Sys., 487 So. 2d 1329, 1330 (Miss. 1986) (exemption of school districts from mandatory worker's compensation has rational basis and does not impinge equal protection rights of injured employees).

[44] 1984 Miss. Laws ch. 495 (codified as amended at MISS. CODE ANN. § 11-46-1(f) (Supp. 1988)). Subsection (f) of § 11-46-1 defines "political subdivision" as "any body politic or body corporate other than the state responsible for governmental activities only in geographic areas smaller than that of the state, including any county, municipality, school district. . . ." *Id.*

[45] MISS. CODE ANN. § 71-3-5 (1972).

[46] 1986 Miss. Laws ch. 492 (codified as amended at MISS. CODE ANN. § 37-7-303 (Supp. 1988)).

[47] *Id.*

civil rights acts beginning in 1964, school districts became vulnerable under Title VI[48] and VII[49] to charges of discrimination. Enforcement of these titles is delegated to the Equal Employment Opportunities Commission and the Office of Civil Rights.[50] The Justice Department has also used section 1983 of Title 42 of the United States Code to assure that school districts comply with the various legislative acts.[51] In addition, section 1983 has been used in private litigation.[52] Fortunately, few school districts in the state have been faced with litigation by private citizens under this section since most of the suits have involved munici-

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[48] Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d-2000d-6 (1982). Title VI states that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." *Id.* § 2000d. Title VI has been used primarily in the context of discrimination. *See, e.g.*, Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 270 (1978) (special admissions program of medical school violated Title VI, California constitution, and equal protection clause); Lau v. Nichols, 414 U.S. 563, 566 (1974) (failure of school system to provide language instruction was violation of Title VI).

[49] Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 (1982). Title VII states, in part, that:

> [i]t shall be an unlawful employment practice for an employer -
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> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national original; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin.

Id. § 2000e-2(a).

[50] *Id.* § 2000e-4(b)(1).

[51] *Id.* § 1983 (1982). Section 1983 states, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any state. . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Id.

[52] *See, e.g.*, Kingsville Indep. School Dist. v. Cooper, 611 F.2d 1109, 1112 (5th Cir. 1980) (independent school districts are subject to suit under § 1983); Flores v. Edinburg Consol. Indep. School Dist., 554 F. Supp. 974, 980 (S.D. Tex. 1983) (injured public school student can maintain civil rights action against school district), *reh'g denied*, 747 F.2d 1465 (5th Cir. 1984) (en banc).

palities and the state.

Title IX of the Education Act of 1972, which requires that all school programs be available to both sexes, has provided another escape from the doctrine of sovereign immunity, acting as a vehicle for attacks on programs offered at elementary, secondary, and higher education levels.[53]

The enactment of section 504 of the Rehabilitation Act of 1973[54] and the Education for All Handicapped Children Act in 1975[55] has increased financial burdens on Mississippi school districts by requiring compliance with these acts as well as necessitating defense of claims regarding placement, suspension and expulsion of students and employment of staff. In 1987, by amendment to the Education for All Handicapped Children Act, school districts were subjected to possible additional financial costs for attorney's fees in the event the school district did not prevail in an administrative or court proceeding.[56] In all claims under the above acts, Mississippi school districts have been

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[53] Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1686 (1982). Title IX prohibits sex discrimination by educational institutions which receive federal financial assistance. *Id.* § 1681.

[54] Section 504 of Title V of the Rehabilitation Act of 1973, 28 U.S.C § 794 (1982). Section 504, which is analogous to Title VI and Title IX, provides that no qualified handicapped individual can be excluded or denied the benefits of any program or activity receiving federal financial assistance solely for the reason of his handicap. *Id.* § 794. Section 504 has been utilized by plaintiffs alleging discrimination in educational programs. *See, e.g.*, Southeastern Community College v. Davis, 442 U.S. 397, 414 (1979) (plaintiff with serious hearing disability denied admission to program did not prove § 504 violation where school concluded she did not qualify for admission); Brookhart v. Illinois State Bd. of Educ., 697 F.2d 179, 184 (7th Cir. 1983) (denial of high school diplomas to certain students with disabilities because of failure to pass minimal competency test did not violate § 504); Helms v. McDaniel, 657 F.2d 800, 806 (5th Cir. 1981) (action challenging state's compliance with § 504; state review procedures found inconsistent with § 504), *cert. denied*, 455 U.S. 946 (1982).

[55] Education for All Handicapped Children Act (EHA) 20 U.S.C. §§ 1401-1461 (1982). EHA mandates certain programs and procedures if states are recipients of federal funds available under the Act. *See, e.g.*, 20 U.S.C. § 1412 (1) (1982) (Act requires states to adopt policy which assures all handicapped children free public education); 20 U.S.C. § 1412(4) (1982) (Act requires states to develop individualized program for each handicapped child).

[56] Handicapped Children's Protection Act of 1986, 20 U.S.C. § 1415 (1982). This Act amended § 615 of the Education for All Handicapped Children Act by adding a new subsection allowing suit under § 504 in addition to the remedies available under the Act, the Constitution, or other federal statutes. *Id.*

stripped of their right to rely upon the doctrine of sovereign immunity.

IV. Legislative Abrogation of Sovereign Immunity

The observer who must plan for the future and has studied the effects of *Pruett* and the legislature's reaction must feel a kinship with prophets of old or, perhaps more accurately, with the prognosticator of weekend football results.

The Mississippi Legislature responded initially to the mandate of the Mississippi Supreme Court concerning sovereign immunity in 1984. Because of extensive changes which would affect the State of Mississippi and its political subdivisions, as well as municipalities and their respective agencies, the initial task confronting the legislature, and the apparent necessity of emergency action, created problems that could not be resolved satisfactorily in such a short period of time. The result was Chapter 495 of the General Laws of 1984.[57] Section 4 of the Act provided that it would apply only to claims that accrued after July 1, 1985, as to the State of Mississippi and its departments and agencies, and after October 1, 1985, as to the political subdivisions, including municipalities and school districts.[58] The Act established a maximum limit of $500,000 for all claims arising out of a single occurrence[59] and designated the State Fiscal Management Board as the administrative agency for carrying out the basic provisions of the Act, in cooperation with state and local authorities.[60] A severe criticism of the initial legislation was its failure to protect the employees of the governmental entity.

The general consensus was that the legislature was attempting to provide, without extensive and exhaustive study, a measure that could serve as a starting point for consideration by the 1985 legislature. A substantial number of school districts throughout the state felt that the Act was a problem which would disappear over a period of time and that sovereign immu-

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[57] 1984 Miss. Laws ch. 495 (codified as amended at Miss. Code Ann. §§ 11-46-1 to -21 (Supp. 1988)).

[58] *Id.* § 4 (codified as amended at Miss. Code Ann. § 11-46-6 (Supp. 1988)).

[59] *Id.* § 9 (1) (codified as amended at Miss. Code Ann. § 11-46-15 (Supp. 1988)).

[60] *Id.* § 11 (codified as amended at Miss. Code Ann. § 11-46-19 (Supp. 1988)).

nity, as to the usual tort claims, would be reinstated. There was an almost unanimous feeling that the Act would be extended for at least one additional year, but with substantial modifications.

In 1985, the general provisions of the 1984 Act were reenacted and the effective dates were extended to July 1, 1986, and October 1, 1986, respectively.[61] In 1986, the Legislature again reenacted the general provisions of the 1984 Act and extended the dates for an additional year.[62]

By 1987, however, there was growing belief that the problem would not disappear and that workable and reasonable legislation was needed to be effective at the earliest possible date. As a result, Chapter 483 was adopted at the regular 1987 legislative session.[63] A two-year statute of limitations was reincorporated into the new Act.[64] The more important changes included in the 1987 act were: (1) protection of employees; (2) a graduated schedule for increasing maximum liability for all claims arising out of a single occurrence;[65] and (3) clarification of exceptions to liability as to certain specified claims, with the effective date for the State of Mississippi being July 1, 1988, and for political subdivisions, October 1, 1988.[66]

The 1987 Act also set forth the responsibilities of the State Fiscal Management Board and the creation of a Tort Claims Fund.[67] The State Fiscal Management Board was given the authority to contract with one or more reputable insurance con-

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[61] 1985 Miss. Laws ch. 474 (codified as amended at MISS. CODE ANN. §§ 11-46-1 to -21 (Supp. 1988)).

[62] 1986 Miss. Laws ch. 438 (codified as amended at MISS. CODE ANN. §§ 11-46-1 to -21 (Supp. 1988)).

[63] 1987 Miss. Laws ch. 483 (codified as amended at MISS. CODE ANN. §§ 11-46-1 to -21 (Supp. 1988)).

[64] *Id.* § 6 (codified as amended at MISS. CODE ANN. § 11-46-11 (Supp. 1988)).

[65] *Id.* § 8 (codified as amended at MISS. CODE ANN. § 11-46-15 (Supp. 1988)).

[66] *Id.* § 5 (codified as amended at MISS. CODE ANN. § 11-46-9 (Supp. 1988)). The most serious exposure that school districts may face with the abrogation of sovereign immunity will result from injuries to students involved in sports activities and physical education programs. Unless an exception is made to extend sovereign immunity to this type of claim, local school districts as well as state colleges and universities will have to deal with a large number of both trivial and serious claims. Administrative, settlement and/or litigation expenses in responding to all such claims will result in exorbitant and unreasonable costs.

[67] *Id.* § 9 (codified as amended at MISS. CODE ANN. § 11-46-17 (Supp. 1988)).

sulting firms to establish a statewide plan of self-insurance and to monitor the insurance policies which might be obtained by subdivisions in lieu of joining the state plan.[68]

Although the State Fiscal Management Board began to implement its responsibilities under the Act within a reasonable time, there remained some skepticism concerning the Act's taking effect in 1988, and concerning the soundness of the program's being established by the Board. Because the Legislature believed that the program being established by the Board was not totally in place and because of financial burdens placed on state revenues to provide compliance with the law, the Act was once again extended at the 1988 Regular Legislative Session.[69]

By early 1989, the Mississippi Legislature again will be considering modification of the provisions of existing law and extension of the effective dates for an additional year. There remains considerable doubt that October 1, 1989, will mark the final demise of sovereign immunity for Mississippi school districts. The danger of continuing to extend the doctrine of sovereign immunity for the State of Mississippi and all of its subdivisions is briefly considered in the conclusion to this article.

V. State Fiscal Management Board

After the legislature modified and refined the laws relating to its repeal of liability immunity in 1987, the State Fiscal Management Board began to perfect its programs as authorized and mandated by the legislature. The insurance division of the State Fiscal Management Board tentatively established two specific funds. The State of Mississippi and its governmental entities, other than political subdivisions, would constitute one separate and independent pool with the funds to be allocated by the legislature for administrative and claims expense.[70] A second pool would be established for all political subdivisions which might desire to participate in a comprehensive plan of self-insurance.[71]

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[68] *Id.* § 10 (codified as amended at Miss. Code Ann. § 11-46-19 (1)(a) (Supp. 1988)).

[69] 1988 Miss. Laws. ch. 442 (codified as amended at Miss. Code Ann. § 11-46-7 (Supp. 1988)).

[70] Miss. Code Ann. § 11-46-17(2) (Supp. 1988).

[71] *Id.* § 11-46-17(3) & (4).

Since this article deals with school districts, this section will be limited to what various school districts might expect under the administration of the Act by the State Fiscal Management Board.

In the late spring of 1988 the insurance agent of record, the assistant superintendent for fiscal affairs, the financial officer, and the attorney for the Gulfport District conferred with a representative of the State Fiscal Management Board.[72] At that time the legislature had not completed fully its revision of the various sections dealing with immunity from liability, although no major changes were anticipated. The Gulfport District was assured that the self-insurance program to be administered by the State Fiscal Management Board would substantially cover all risks which the school district might face under the new law anticipated to be effective October 1, 1988.[73]

Provided that all or a substantial number of school districts participated in the self-insurance program, the projected cost to each school district within the state would be calculated at $2.45 per student. That rate would be committed firmly for two years, after which there could be a reexamination and an increase in the premium charged. If fewer districts participated, then the cost per student might be increased by twenty-five percent, or $.62 per student. Thus, it was very simple for each school district to estimate its immediate cost under this program.[74]

The law also provided that a school district could meet the statutory requirements by securing protection of one or more liability insurance policies to be approved by the State Fiscal Management Board.[75] Section 11-46-17 of the act, as amended by the legislature in 1988, provided that:

> Such plan shall provide coverage to each such governmental entities for *every risk* for which the board [State Fiscal Management Board] determines the respective governmental entities to be liable in the event of a claim or suit for injuries

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[72] Confidential Memorandum from Owen T. Palmer, Jr. (March 7, 1988).

[73] *Id.*

[74] *Id.* School boards will face costs additional to the self-insurance program. Upon the effective date of the waiver of immunity, school districts must also provide workers' compensation coverage for their employees. MISS. CODE ANN. § 71-3-5 (1972).

[75] MISS. CODE ANN. § 11-46-17 (Supp. 1988).

> under the provisions of this chapter, including claims or suits for injuries from the use or operation of motor vehicles; provided, however, that the Fiscal Management Board may allow such plan to contain any reasonable limitations or exclusions not contrary to Mississippi state statutes or case law as are normally included in commercial liability insurance policies generally available to governmental entities. In addition to the coverage authorized in the preceding sentence, the plan may provide coverage for liabilities outside the provisions of this chapter, including but not limited to liabilities arising from Sections 1983 through 1987 of Title 42 of the United States code and liabilities from actions brought in foreign jurisdictions, and the board shall establish limits of coverage for such liabilities.[76]

The Gulfport District was assured in the spring of 1988 that, subject to the limitations contained in the Act, school districts would be protected from the risks of hazardous materials, pollution claims, liability for acts prohibited by section 1983, and certain other risks not covered by the usual commercial insurance policies.[77] During the conference in the spring of 1988 and at the seminar of the Mississippi Council of School Board Attorneys in October, 1988, assurance was given that in the event the limits of liability were not honored by the courts, after proper appeal to the Mississippi Supreme Court, school districts would be protected as to any excess judgment which might be affirmed. A concern was voiced that the $25,000 maximum liability limit for all claims arising out of a single occurrence during the first year of the Act appeared to be unreasonably low and was, as a matter of fact, only fifty percent of the protection afforded under the Accident Contingency Fund Act.[78] In view of the uncertainties as to potential liability facing school districts unprotected by self-insurance programs with the State Fiscal Management Board, a valuable addition to the plan would be a type of umbrella coverage in excess of and secondary to cover-

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[76] *Id.* (emphasis added).

[77] *See supra* note 72. At the annual seminar of the Mississippi Council of School Board Attorneys in October, 1988, a representative of the State Fiscal Management Board was not as unequivocable in his assurances of such coverage.

[78] *Id.*

ages furnished.

There is a serious question as to how many of the 153 school districts truly understand the risks anticipated when the shield of limited sovereign immunity is no longer available and exposure to risks for which districts have no adequate insurance or other protection is realized. The Mississippi School Boards Association and the Mississippi Council of School Board Attorneys have held several seminars in recent years with limited program segments focusing on the mandate of *Pruett* and the legislation which has ensued. If the legislature in 1989 fails to extend the doctrine of sovereign immunity for an additional year, it is imperative for school districts wanting to maintain their financial integrity to join together in a mandatory in-depth conference to assure that they will be protected through adequate insurance coverage under either the State Fiscal Management Board plan, commercial insurance policies, or a combination of both.

VI. Conclusion

The possibility or, perhaps probability, exists that sovereign immunity for school districts will be extended for one or more years after October 1, 1989. The basis for this feeling is that additional time is required to increase the reserve necessary to finance the plan for the state and its principal agencies and for the State Fiscal Management Board to prepare a workable plan for both the state and its political subdivisions.

Pursuant to section 11-46-19 of the Mississippi Code, the State Fiscal Management Board already has contracted with an insurance consulting firm to administer the processing and settlement of claims, plus any necessary legal defense. To date, details regarding the local adjusters and attorneys required to handle claims and litigation apparently have not been resolved.

October 1, 1989, will mark the seven-year anniversary of the *Pruett* decision. Judge Bowling, writing for an *en banc* court in *Pruett*, expressed with clarity the problem of continuing the absolute sovereign immunity doctrine. A few of his statements even more pertinent today than they were in 1982, conclude that:

> [w]e could continue and give many examples of why the abso-

> lute sovereign immunity doctrine is out of date in modern society and modern legal concepts. The inequity of the situation is articulated by examining our safety responsibility law which requires insurance coverage of all vehicles operated by persons, firms, co-partnerships, associations, etc., but expressly provides that such requirements do not apply with respect to any motor vehicle owned by the State of Mississippi or any subdivision of this state. The injustice of this legal prohibition as explained in the above set out example is obvious.[79]

Pruett is replete with similar and even stronger condemnations of the failure of the State of Mississippi to address realistically this problem. Is it inconceivable that, if the *Pruett* mandate continues to be ignored after seven to ten years and suit is filed on behalf of a child killed or seriously injured as a result of the negligence of school employees, that a circuit court judge might permit the evidence to go to the jury and that a substantial judgment could be rendered? Can the school district then depend upon the Supreme Court of Mississippi to respond with additional time to implement *Pruett*? The problems posed in those questions must be resolved before a school district discovers that the legislature has acted too little, too late.

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[79] *Pruett*, 421 So. 2d at 1047. The Court in *Pruett* cited numerous opinions from across the country reinforcing its view that sovereign cimmunity was dated. For example, the court, cited an opinion from New Mexico with approval:

> Likewise, we agree with the Supreme Court of Florida that in preserving the sovereign immunity theory, courts have overlooked the fact that the Revolutionary War was fought to abolish that "divine right of Kings" on which the theory is based.

Id. (quoting Molitor v. Kaneland Community Unit Dist. No. 302, 18 Ill. 2d 11, 21-22, 163 N.E.2d 89, 94 (1959)).

Further indicating its disdain for sovereign immunity, the *Pruett* court quoted a Kansas decision:

> . . . [t]he doctrine of governmental immunity is an historical anachronism which manifests an inefficient public policy and works injustice upon everyone concerned.

Pruett, 421 So. 2d at 1050 (quoting Brown v. Wichita State Univ., 217 Kan. 279, 540 P.2d 66 (1975)).

APPENDIX I

STATE	IMMUNITY WAIVED FOR SIMPLE NEGLIGENCE	IMMUNITY WAIVER FOR GROSS NEGLIGENCE
AL		
AK	X	X
AZ		X(17,18)
AR	X(1)	X(1)
CA	X	X
CO	X(2,5,7)	X(2,5,7)
CT	X	X
DE		X
DC		X
FL	X	X
GA		
HI	X	X
ID	X	X
IL	X	X
IN		X(4)
IA	X	X
KA	X	X
KY	X(9,13)	X(9,13)
LA	X	X
ME	X(5,6,7)	X(5,6,7)
MD	X(2,13)	X
MA	X	X
MI	X(5,7)	X(5,7)
MN	X	X
MS	X(10/1/88)	X(10/1/88)
MO	X(5,6,7)	X(5,6,7)
MT	X	X
NE	X	X
NV	X	X
NH	X(5,7)	X(5,7)
NJ	X(7,9)	X(7,9)
NM	X(5,6,7)	X(5,6,7)
NY	X(5)	X(5)

STATE	IMMUNITY WAIVED FOR SIMPLE NEGLIGENCE	IMMUNITY WAIVER FOR GROSS NEGLIGENCE
NC	X(2)	X
ND	X	X
OH	X(5,8)	X(5,8)
OK	X	X
OR	X	X
PA	X(5,7,19)	X(5,7,19)
RI	X	X
SC	X	X
SD		
TN	X(5,7,9)	X(5,7,9,10)
TX	X(5,11)	X(4,5,11,12)
UT	X(5,7,9,15,16)	X(5,7,9,15,16)
VT	X(2)	X(2)
VA	X(13)	X(13)
WA	X	X
WV	X(5,7,9)	X(5,7,9)
WI	X	X
WY	X(5,7)	X(5,7)

STATUTORY CITATIONS

Alaska Stat. § 9.05.250 (1985)
Ariz. Rev. Stat. Ann. § 12-820.01 (Supp. 1987)
Ark. Stat. § 80-1811 (1975) (school district not liable, just driver or operator of a school bus)
Cal. Govt. Code § 945 (1978)
Colo. Rev. Stat. §§ 24-10-104.-106 (1984)
Conn. Gen. Stat. §§ 10-212a. 52-557b(b) (1985)
Del. Code Ann. tit. 10. § 4001(3) (1987)
D.C. Code Ann. § 6-1012 (1981)
Fla. Stat. Ann. § 768.28(1). (5) (1977)
Haw. Rev. Stat. § 662-2 (1978)
Idaho Code § 6-903(a) (1981 & Supp. 1987)
Ill. Rev. Stat. Ch. 122 §§ 821-31 (1962 & Supp. 1988) (sovereign immunity of school districts waived by *Moiltor v. Kaneland Community Dist. No. 302.* 18 Ill.2d 11, 163 N.E.2d 89 (1959),

cert. denied, 362 U.S. 968 (1960).
Ind. Code Ann. § 34-4-16.5-3.5 (1986 & Supp. 1987)
Iowa Code §§ 613A.2, 613A.4 (1985)
Kan. Stat. Ann. § 75-6101 (1983 & Supp. 1987)
Ky. Rev. Stat. Ann. § 44.072 (Supp. 1986)
La. Const. art. 12, § 10(A) (1977)
Me. Rev. Stat. Ann. tit. 14. § 8104 (1984)
Md. State Govt. Code Ann. §§ 12-103,-104 (1984 & Supp. 1987)
Mass. Gen. Laws Ann. ch. 258 § 2 (Supp. 1988)
Mich. Comp. Laws §§ 691.1405. .1406 (1982 & Supp. 1987)
Minn. Stat. Ann. § 466.02 (1984)
Miss. Code Ann. § 11-46-5(1) (Supp. 1987)
Mo. Rev. Stat. § 537.600 (1987)
Mont. Code Ann. § 2-9-102 (1983)
Neb. Rev. Stat. § 23-2407 (1985)
Nev. Rev. Stat. § 41.031 (1987)
N.H. Rev. Stat. Ann. § 507-B:2 (1983)
N.J. Stat. Ann. §§ 59:2-2, 59:3-1, 59-4-2 (1983)
N.M. Stat. Ann. § 41-4-4 to -4-6 (1978)
N.Y. Gen. Mun. Code § 50-6 (1986)
N.C. Gen. Stat. § 115C-42 (1987)
N.D. Cent. Code § 32-12.1-03(1) (1981)
Ohio Rev. Code Ann. § 2744.02(A), (B)(1), (2) (1988)
Okla. Stat. Ann. tit. 51, §§ 153, 155 (1984)
Or. Rev. Stat. § 30.265 (1987)
Pa. Stat. Ann. tit. 42. § 8542 (1982)
R.I. Gen. Laws § 9-31-1 (Supp. 1983)
S.C. Code Ann. §§ 15-78-20 to -60 (Supp. 1987)
Tenn. Code Ann. §§ 29-20-201 to -205 (1980)
Tex. Educ. Code Ann. §§ 21.912(b) .914 (1987); Tex. Civ. Prac. & Rem. Code § 101.021, .051 (1986)
Utah Code Ann. §§ 63-30-5 to -10 (1986)
Vt. Stat. Ann. tit. 29, § 1403 (1986)
Va. Code Ann. § 8.01-195.3 (1984 & Supp. 1988)
Wash. Rev. Code Ann. § 4.96.010 (Supp. 1988)
W. Va. Code § 29-12A-4 (1986)

Wis. Stat. Ann. § 893.80 (1983) (Legislative Council Report notes judicial waiver of immunity from which statute draws some of its content)
Wyo. Stat. §§ 1-39-105, -106 (1987)

FOOTNOTES

[1] only for school bus drivers and operators
[2] only to the extent of insurance
[3] only in execution or enforcement of laws
[4] only in administering medication to students
[5] only for operation of motor vehicle
[6] only for machinery, furnishings
[7] only for construction, operation and/or maintenance of public buildings or other property, thoroughfares
[8] only for proprietary functions
[9] only for negligence of employees
[10] only for gross negligence of board members
[11] only when bodily injury caused to students
[12] only for gross negligence when disciplining students
[13] only as to state liability, not local governmental entities
[14] only when rendering emergency first aid
[15] only as to contractual obligations
[16] only as to property actions
[17] only as to issuance or failure to revoke any permit, license, certificate, approval, etc.
[18] only as to failure to discover violations of inspection laws applicable to property other than property owned by the public entity
[19] only as to trees, traffic controls, street lighting, utility services, animals

APPENDIX II

Chapter 354 STATE OF MISSISSIPPI, 1982

SECTION 15. Section 37-41-41, Mississippi Code of 1972, is amended as follows:

37-41-41. Compensation on any claim shall be disbursed to such county or municipal separate school district or special municipal separate school district or junior college district or consolidated school district from the Accident Contingent Fund to cover any accident arising as provided in Section 37-41-37, upon the receipt of a certified copy by the circuit clerk of any judgment rendered in such cases, in the event that the same are concluded by litigation, or upon the receipt of a certificate from the chancery clerk of such county or of a properly executed release with bills attached from the superintendent or president as provided in said section, in the event that any such claim or claims shall be settled by way of compromise without litigation. No such claim shall be paid from any fund other than the Accident Contingent Fund.

No such claim arising from such accident shall exceed the total amount of Ten Thousand Dollars ($10,000.00) exclusive of court costs for any one (1) person sustaining such injuries or damages, and no more than Fifty Thousand Dollars ($50,000.00) shall be paid in any one (1) accident. When it appears that claims in more than the amount of Fifty Thousand Dollars ($50,000.00) will be made because of one (1) accident, the chancellor either in court term or vacation shall prorate said claims as in his opinion are just and equitable.

No claim for property damage shall be paid in excess of One Thousand Dollars ($1,000.00) per claimant per accident. When no claim is made for personal injuries by way of suit, hospital, medical and doctor bills may be paid in a sum not to exceed One Thousand Dollars ($1,000.00) per person per accident.

APPENDIX III

§ 11-46-11. Statute of limitations; notice of claim requirements.

(1) Any person having a claim for injury arising under the provisions of this chapter against a governmental entity or its employee shall proceed as he might in any action at law or in equity; provided however, that ninety (90) days prior to maintaining an action thereon, such person shall file a notice of claim with the chief executive officer of the governmental entity, and, if the governmental entity is participating in a plan administered by the board pursuant to Section 11-46-7(3), such chief executive officer shall notify the board of any claims filed within five (5) days after the receipt thereof.

(2) The notice of claim required by subsection (1) of this section shall be in writing, delivered in person or by registered or certified United States mail. Every notice of claim shall contain a short and plain statement of the facts upon which the claim is based, including the circumstances which brought about the injury, the extent of the injury, the time and place the injury occurred, the names of all persons known to be involved, the amount of money damages sought and the residence of the person making the claim at the time of the injury and at the time of filing the notice.

(3) All actions brought under the provisions of this chapter shall be commenced within two (2) years next after the cause of such action accrued, and not after; provided, however, that the filing of a notice of claim as required by subsection (1) of this section shall serve to toll the statute of limitations for a period of ninety-five (95) days.

SOURCES: Laws, 1984, ch. 495, § 7; reenacted without change, Laws 1985, ch. 474, § 6; 1987, ch. 483, § 6; 1988, ch. 479, § 3, eff from and after July 1, 1988.

Editors Note—

Section 50, Laws, 1987, ch. 483, provides as follows:

"Section 4, Chapter 495, Laws of 1984, as reenacted and amended by Section 12, Chapter 474. Laws of 1985, as amended by Section 6, Chapter 438, Laws of 1986, which specifies the causes of action that are covered by Chapter 46, Title 11, Mississippi Code of 1972, and specifies the law that

governs causes of action that occur prior to the effective date of coverage of Chapter 46, Title 11, Mississippi Code of 1972, is hereby repealed."

Research and Practice References—

1984 Mississippi Supreme Court Review: Civil Procedure. 55 Miss. LJ 49, March, 1985.

§ 11-46-13. Jurisdiction; appeals; venue.

(1) Jurisdiction for any suit filed under the provisions of this chapter shall be in the court having original or concurrent jurisdiction over a cause of action upon which the claim is based. Appeals may be taken in the manner provided by law.

(2) The venue for any suit filed under the provisions of this chapter against the state or its employees shall be in the county in which the cause of action arose, or in Hinds County. The venue for all other suits filed under the provisions of this chapter shall be in the county in which the principal offices of the governing body of the political subdivision are located.

SOURCES: Laws, 1984, ch. 495, § 8; reenacted without change, Laws 1985, ch. 474, § 7; 1987, ch. 483, § 7, eff from and after passage (approved April 15, 1987).

Editor's Note—

Section 50, Laws, 1987, ch. 483, provides as follows:

"Section 4, Chapter 495, Laws of 1984, as reenacted and amended by Section 12, Chapter 474, Laws of 1985, as amended by Section 6, Chaper 438, Laws of 1986, which specifies the causes of action that are covered by Chapter 46, Title 11, Mississippi Code of 1972, and specifies the law that governs causes of action that occur prior to the effective date of coverage of Chapter 46, Title 11, Mississippi Code of 1972, is hereby repealed."

§ 11-46-15. Limitation of liability; exemplary or punitive damages; interest; attorney's fees; reduction of award.

(1) In any claim or suit for damages against a governmental entity or its employee brought under the provisions of this chapter, the liability shall not exceed the following for all claims arising out of a single occurence for all damages permitted under this chapter:

(a) For claims or causes of action arising from acts or omissions occurring on or after July 1, 1989, but before July 1, 1990, the sum of Twenty-five Thousand Dollars ($25,000.00);

(b) For claims or causes of action arising from acts or omissions occurring on or after July 1, 1990, but before July 1, 1991, the sum of Two Hundred Thousand Dollars ($200,000.000);

(c) For claims or causes of action arising from acts or omissions occuring on or after July 1, 1991, the sum of Five Hundred Thousand Dollars (500,000.00).

(2) No judgment against a governmental entity or its employee for any act or omission for which immunity is waived under this chapter shall include an award for exemplary or punitive damages or for interest prior to judgment, or an award of attorney's fees unless attorney's fees are specifically authorized by law.

(3) Except as otherwise provided in Section 11-46-17(4), in any suit brought under the provisions of this chapter, if the verdict which is returned, when added to costs and any attorney's fees authorized by law, would exceed the maximum dollar amount of liability provided in subsection (1) of this section, the court shall reduce the verdict accordingly and enter judgment in an amount not to exceed the maximum dollar amount of liability provided in subsection (1) of this section.

SOURCES: Laws, 1984, ch. 495, § 9; reenacted without change, Laws 1985, ch. 474, § 8; 1987, ch. 483, § 8; 1988, ch. 442, § 5, eff from and after passage (approved April 25, 1988).

Editor's Note—

Section 50, Laws, 1987, ch. 483, provides as follows:

"Section 4, Chapter 495, Laws of 1984, as reenacted and amended by Section 12, Chapter 474, Laws of 1985, as amended by Section 6, Chapter 438, Laws of 1986, which specifies the causes of action that are covered by Chapter 46, Title 11, Mississippi Code of 1972, and specifies the law that governs causes of action that occur prior to the effective date of coverage of Chapter 46, Title 11, Mississippi Code of 1972, is hereby repealed."

Cross references—

As to definition of "employee," see § 11-46-1.

As to waiver of immunity, see § 11-46-5.

As to provisions relative to insurance coverage in excess of the maximum liability set forth in this section and waiver of such maximum, see § 11-46-17.

Research and Practice References—

1984 Mississippi Supreme Court Review: Civil Procedure. 55 Miss LJ 49, March, 1985.

THE LEGAL STATUS OF FUNCTIONAL LITERACY EXAMINATIONS

*Robert J. Beebe**

A key development in the national movement to reform public education has been the establishment of state testing programs designed to measure the achievement of those reform goals.[1] One such program — the functional literacy examination or the student minimum competency examination — is the focus of this article. Such testing has long been a controversial subject among those in the education profession.[2] A long-awaited decision concerning the functional literacy testing was reached by the United States Court of Appeals for the Eleventh Circuit in *Debra P. v. Turlington.*[3] The United States District Court for the Southern District of Georgia also ruled on this question in *Anderson v. Banks.*[4] Commentators have viewed the relevant legal issues from a variety of perspectives.[5] Therefore, an assess-

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[1] T. Sergiovanni, M. Burlingame, F. Coombs, & P. Thurston, Educational Governance and Administration 22-24 (2d ed. 1987).

[2] *See* Logar, *Minimum Competency Testing in Schools: Legislative Action and Judicial Review,* 13 J. L. & Educ. 35, 35-38 (1984)(arguments for and against competency testing); McClung, *Competency Testing Programs: Legal and Educational Issues,* 47 Fordham L. Rev. 651, 665-72 (1979)(discussion of educational debate over testing standards).

[3] 644 F.2d 397 (5th Cir.), *reh'g denied,* 654 F.2d 1079 (5th Cir. 1981)(en banc), *remanded,* 564 F. Supp. 177 (M.D. Fla. 1983), *aff'd,* 730 F.2d 1405 (11th Cir. 1984).

[4] 540 F. Supp. 761 (S.D. Ga. 1982). Two cases, Brookhart v. Illinois State Bd. of Educ., 534 F. Supp. 725 (D. Ill.1982), and Board of Educ. v. Ambach, 457 N.E.2d 775, 469 N.Y.S.2d 669 (Ct. App. 1983), have reviewed functional literacy examination requirements as applied to handicapped students. Because of the special facts of instructional programming for the handicapped, these cases have been judged inapplicable to the present discussion.

[5] *See supra* note 2 and accompanying text.

ment of the legal status of functional literacy examinations appears appropriate.

By 1984, thirty-seven states had enacted legislation requiring the administration of functional literacy examinations, with seventeen requiring a passing score on the test as a prerequisite for high school graduation.[6] No state at present has rescinded these requirements[7]. This article reviews the relevant case law to date and discusses the legal issues that remain unresolved. The importance of this article will be evident to those officials enforcing functional literacy examination requirements and needing to understand the legal vulnerability of such tests as well as to those who are critical of functional literacy examinations and are searching for tools with which to raise new legal challenges to such programs. The author's hope is to encourage the continual examination of functional literacy examinations.

I. *Debra P. v. Turlington*

In 1978, the Florida legislature amended the Educational Accountability Act of 1976 requiring that all Florida public school students pass a functional literacy examination — the State Student Assessment Test, Part II (SSAT-II) — in order to receive a state high school diploma.[8] Debra P. filed a class action against state officials implementing this requirement seeking to represent all present and future twelfth grade students in the state who had failed or would fail the SSAT-II, all similarly situated black students in the state, and all similarly situated black students in her school district. The suit challenged the SSAT-II requirement as a violation of the due process and equal protection clauses of the fourteenth amendment, Title VI of the Civil Rights Act of 1964, and the Equal Educational Opportunities

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[6] Silas, *Testing the Tests: Can Diplomas Be Withheld*? 70 A.B.A. J. 29, 29 (1984).

[7] *See* Logar, *supra* note 2, at 39 & nn.13, 15-16 (thirty-seven states are Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oregon, Rhode Island, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington, and Wyoming).

[8] 730 F.2d 1405, 1406 (11th Cir. 1984). *See also* FLA. STAT. ANN. § 229.57 (West 1989)(most recent version of challenged statute).

Act of 1976.[9] A key allegation in the suit centered around the fact that the testing requirement had a disproportionate impact on black students. At the time suit was filed, the failure rate of black students for Fall 1977, Fall 1978, and Spring 1979, was approximately ten times that of white students.[10]

In addition to the allegations that the test was racially biased in violation of the fourteenth amendment's equal protection clause, Title VI, and the Equal Educational Opportunities Act, the plaintiff alleged that the awarding of diplomas under the new SSAT-II provision without providing adequate notice of the new requirement or adequate time to prepare for the required examination deprived the plaintiffs of due process under the fourteenth amendment. Additionally, the plaintiff alleged that the SSAT-II was a mechanism for resegregating the Florida schools through the assignment to remedial classes of those students failing the examination.[11] Debra P. sought a declaratory judgment that the SSAT-II requirement as a prerequisite to receiving a state high school diploma was constitutionally and statutorily invalid, an injunction restraining the use of the test results in awarding school diplomas, an injunction to purge the plaintiffs' scholastic records of any notation of SSAT-II failure, and an order to prohibit the use of SSAT-II results as a means of structuring remedial classes.[12]

On the equal protection and statutory claims, the trial court found the testing program invalid since its implementation perpetuated the harmful effects of the segregated, unequal, and inferior education received by the black plaintiffs before school desegregation.[13] The court, however, held that the SSAT-II was not itself arbitrary, unreasonable, or without a rational relation

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[9] *Debra P.*, 730 F.2d at 1406. Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d-2000d-6 (1976), prohibits discrimination on the basis of race, color, or national origin under federally assisted programs. *Id.* § 2000d. The Equal Educational Opportunities Act, 20 U.S.C. § 1703 (1976), prohibits the denial of equal educational opportunity on the basis of race, color, sex, or national origin. *Id.* § 1703.

[10] *Debra P.*, 730 F.2d at 1406.

[11] Debra P. v. Turlington, 474 F.Supp. 244, 246-27 (M.D. Fla. 1979).

[12] *Id.* at 247.

[13] *Id.* at 256-27. On the question of intent to discriminate, the court found the proof of present intent insufficient, but stated that the past purposeful discrimination was perpetuated by the test and the diploma sanction regardless of its neutrality. *Id.* at 254-55.

to the valid state purpose of distinguishing between "functionally literate" and "functionally illiterate" high school students.[14] In addition, the test was held to possess content and construct validity, and not to contain racially or ethnically biased test items.[15] Furthermore, the trial court also found a due process violation in that the two-month time period provided for implementation of the SSAT-II program failed to give adequate notice of the new testing requirement and an adequate opportunity for the plaintiffs to prepare for the test.[16] The SSAT-II program was held to have deprived the students of a property right to graduate from high school despite the fact that they had fulfilled all previous requirements for the high school diploma.[17] In addition, the court held that instruction in the years prior to SSAT-II's implementation had not taken into account the specific objectives tested by the SSAT-II or its accompanying sanction.[18] Thus, the students were held to have been deprived of the protectable liberty interest of being free of the stigma associated with the denial of a high school diploma and its economic and psychological consequences.[19]

However, the trial court found that the remedial classes for students who failed the SSAT-II provided improved educational opportunities for a period no longer than necessary to compen-

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[14] *Id.* at 260-61. The court recognized that the test did not equal every definition of functional literacy, but that it did match the one given by the Florida Department of Education and the State Board of Education, as well as satisfying the Florida legislature. *Id.* Thus, the test was rationally related to a valid state interest. *Id.* at 261.

[15] *Id.* at 261-62. The court was satisfied that the skill objectives of the test were adequately evaluated by the test items and that the test had adequate content validity in addition to adequate construct validity. *Id.* at 261. The court, however, was not convinced by the plaintiffs' evidence that the test or any test item should be invalidated for racial or ethnic bias. *Id.* at 262.

[16] *Id.* at 267. The court stated that the plaintiffs, after spending ten years in schools which compelled their attendance, were informed of a requirement concerning skills which, if taught, should have been taught in grades they had long since completed. *Id.*

[17] *Id.* at 266.

[18] *Id.* at 264. Since instruction in the skills necessary to successfully complete the functional literacy test was a cumulative and time consuming process, the court found that it was critical that at the time of instruction the student knew that the individual skill he was being taught had to be learned prior to his graduation from school. *Id.*

[19] *Id.* at 266. The stigma associated with failure of the competency test was very real, according to the court, and would affect the economic and psychological development of the individual. *Id.*

sate for the students' identified deficiencies and was not, therefore, impermissible.[20] The court, therefore, enjoined the state for a period of four years from requiring a passing score on the SSAT-II as a requirement for graduation.[21] After this period, the state would have had ". . . the necessary period of time to orient the students and teachers to the new functional literacy objectives, to insure instruction in the objectives, and to eliminate the taint on educational development which accompanied segregation . . . ."[22] The court did, however, permit the state to continue to use SSAT-II scores and its remedial program in order to correct the deficiencies of those students who failed the test.[23]

On appeal, the United States Court of Appeals for the Fifth Circuit reviewed the constitutional and statutory validity of reimplementation of the diploma sanction after the four-year suspension period. The Fifth Circuit remanded the case for further findings of fact on the question of whether the SSAT-II covered material not taught to students since there was no evidence in the record that the state had made any effort to establish this question, a central matter in insuring the curricular validity of the SSAT-II.[24] The court stated, "[I]f the test covers material not taught the students, it is unfair and violates the Equal Protection and Due Process clauses of the United States Constitution."[25] The Fifth Circuit ordered the trial court, if it found that the test was fair, to reexamine and clarify "the role and effect of the 'vestiges' of past discrimination" upon the performance of black students, to furnish a guide in the fashioning of an appropriate remedy.[26]

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[20] *Id.* at 268. Even though the compensatory education program constituted only two classes or hours per day at most, due to the disproportionately large black composition of participants, the court warned defendants to be constantly wary to prevent the test and subsequent remedial classes from isolating and stigmatizing any children for longer than was necessary to compensate for the identified deficits. *Id.*

[21] *Id.* at 269.

[22] *Id.*

[23] *Id.* This practice would be consistent with the manner in which the state retained other achievement test scores. *Id.*

[24] Debra P. v. Turlington, 644 F.2d 397, 405-06 (5th Cir. 1981).

[25] *Id.* at 402.

[26] *Id.* at 408 n.19. The Fifth Circuit denied a subsequent petition for rehearing.

On remand, the United States District Court for the Middle District of Florida heard evidence on the curricular validity of the SSAT-II to determine whether the examination tested material actually taught to the students and to ascertain the effect of the vestiges of past discrimination upon black students' performance.[27] As a part of this evidentiary hearing, a four-part study was carried out. The first part of the study involved a survey of all teachers in Florida as to whether they had provided instruction relating to the skills tested on the SSAT-II, and if so, whether they had provided instruction sufficient for a student to master those skills.[28]

Secondly, a survey was sent to all 67 school districts and four laboratory schools in the state asking for an estimate of the grade level at which students received preparation in the SSAT-II skills and the grade level at which the majority of students would have mastered the skills. This survey also sought information concerning any major instructional variations among schools, any remedial programs relating to mastery of SSAT-II skills, any staff development programs used to promote such mastery, instructional materials that specifically prepared students for any of the SSAT-II skills, and programs directed toward helping students pass the SSAT-II.[29] Thirdly, a series of site visits was conducted in order to verify the accuracy of the district and school reports.[30] And lastly, a student survey administered by the site visitors to one or two eleventh-grade social studies and English classes asked the students whether or not they had been taught in school how to answer questions on the SSAT-II skills.[31]

This information plus the testimony of five expert witnesses led the court to find the SSAT-II curricularly valid. The court declined to require additional proof that the individual plaintiffs had actually been taught the SSAT-II skills.[32] The court was im-

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Debra P. v. Turlington, 654 F.2d 1079 (5th Cir. 1981).

[27] Debra P. v. Turlington, 564 F. Supp. 177, 179 (M.D. Fla. 1983).

[28] *Id.* at 180.

[29] *Id.* at 180-81.

[30] *Id.* at 181.

[31] *Id.*

[32] *Id.* at 181-84.

pressed by the fact that students were given five opportunities to pass the SSAT-II between the tenth and twelfth grades, and that remedial help was available in the event of failure.[33]

On the issue of past discrimination, the court was asked to assess the constitutional impact of the remaining effects of racial segregation of schools. Based on the testimony of three witnesses, the court found "no causal link between the disproportionate failure rate [of black students] and the present effects of past school segregation. Moreover, even if there was a causal connection, the defendants [had] carried their burden of showing that the SSAT-II is necessary to remedy those effects."[34] For these reasons, the court declined to extend the injunction suspending the use of the SSAT-II beyond the initial four-year period.[35]

The United States Court of Appeals for the Eleventh Circuit reviewed the findings of the district court finding nothing clearly erroneous. On the issue of curricular validity, the court found no legal requirement for direct evidence of what students were actually taught, no necessity for evidence of what had been taught in Florida schools every year since 1971, and no reason not to admit the studies used to validate the SSAT-II.[36] On the past discrimination issue, the court found the fact that 91 to 99 percent of black students passed the test to be strong evidence that the vestiges of past discrimination did not cause blacks to fail the test.[37] Thus, the court affirmed the findings of the district court holding that the State of Florida could deny diplomas to students who had not passed the SSAT-II after the expiration of the four-year period.[38]

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[33] *Id.* at 185.

[34] *Id.* at 188.

[35] *Id.* at 189. The court stated that the use of the SSAT-II could be enjoined only if it perpetuated the effects of past school segregation or if it was not needed to remedy those effects. *Id.* Since the State of Florida had undertaken massive efforts to improve the education of its school children, the court justified its decision not to extend the injunction. *Id.*

[36] Debra P. v. Turlington, 730 F.2d 1405, 1409-14 (11th Cir. 1984).

[37] *Id.* at 1414-16.

[38] *Id.* at 1416-17.

II. *Anderson v. Banks*

Anderson v. Banks[39] examined the validity of a local school district policy that required, as a condition to the awarding of a high school diploma, passing mathematics and reading scores on the California Achievement Test (CAT).[40] The plaintiffs, students who were scheduled to graduate from high school, requested that the school board rescind or not enforce the school district's diploma sanction.[41] After a hearing, the school board denied the request and was affirmed by the State Board of Education. The plaintiffs then appealed to the Superior Court of Tattnal County, which affirmed the State Board of Education's decision.[42] On appeal to the Georgia Court of Appeals, the court considered whether the local board exceeded its statutory authority by imposing a requirement for graduation beyond the requirements established by the State Board of Education. Addi-

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[39] 520 F. Supp. 772 (S.D. Ga. 1981), *on reh'g*, 540 F. Supp. 761 (S.D. Ga. 1982), *appeal dismissed sub nom.* Johnson v. Sikes, 730 F.2d 644 (11th Cir. 1984).

[40] *Anderson*, 540 F. Supp. at 762. Plaintiffs argued that the California Achievement Test (CAT) was not a fair test of the material actually taught in Tattnal County public schools. *Id.* at 762-65,. Their expert, Dr. Robert Calfee, criticized the curriculum match as failing to take account of aspects such as readability, passage type and question complexity. *Id.* at 762. Additionally, plaintiffs alleged that students had not been taught parts of the curriculum. *Id.* at 763. A final argument was that students making the largest gains on the CAT during high school years were those who scored the lowest on entry to high school. *Id.* at 764. The court denied this argument stating that the increased performance was a tribute to the Tattnal County program. *Id.*

[41] Wells v. Banks, 266 S.E.2d 270 (Ga. Ct. App. 1980). The first suit challenging the CAT requirement, styled Wells v. Banks, began in the Georgia courts. Claims initially were raised in an administrative proceeding which progressed from the local school board, to the State Board of Education, and ultimately to the Georgia Court of Appeals. This suit, still styled Wells v. Banks, was also filed in the United States District Court for the Southern District of Georgia. *Wells* asserted due process, equal protection, and state law claims. While the case was pending in the federal district court, the authority of the school board to require the examination was upheld in the Georgia court system. The Georgia courts also found no equal protection violation in the fact that the requirement was applied in one county only rather than statewide. There were no black plaintiffs remaining in the suit in the federal district court at the time of trial. The case was restyled Anderson v. Banks. In addition, the suit styled Johnson v. Sikes was consolidated with the *Anderson* suit. *See* Anderson v. Banks, 520 F. Supp. 472, 476-77 (S.D. Ga. 1981)(outlining history of suit).

[42] *Wells*, 266 S.E.2d at 271. The achievement test was designed to determine whether or not a student who had otherwise qualified to graduate possessed the skills in math and reading expected of a student entering the ninth grade. *Id.*

tionally, the court addressed the issue of whether the application of the diploma sanction denied plaintiffs due process because of insufficient notice, and due to the policy's being applied locally rather than statewide, whether it denied plaintiffs equal protection.[43]

In addressing the first issue, the court found no statutory support for the plaintiffs' argument, construing the applicable language to hold that the school board had not exceeded its authority. With regard to the due process claim, the court found the two-year notice provision adequate. The court found no necessity that all school boards control the quality of public education in the same way.[44]

In a consolidated action to resolve several similar challenges to the use of the CAT as a high school exit requirement, the United States District Court for the Southern District of Georgia addressed five claims pertinent to functional literacy examinations.[45] The plaintiffs alleged: 1) that the diploma policy, because of its disproportionate impact on black students, discriminated on the basis of race in violation of the fourteenth amendment's equal protection clause; 2) that the diploma requirement violated the equal protection clause when applied to black students who had attended racially segregated schools; 3) that the diploma sanction, if found violative of the equal protection clause, also violated Title VI and the Equal Educational Opportunities Act; 4) that the two-year provision of the revised requirement did not provide failing students with sufficient due process of law under the fourteenth amendment; and 5) that the

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[43] *Id.* at 271-72.

[44] *Id.* The court reviewed GA. CODE ANN. § 32-653a finding no indication that local boards might not impose additional requirements for graduation. *Id.* The court read the state board's policy as specifically permitting local boards to require additional credit units for graduation and making it the responsibility of local boards to establish "performance objectives" and "performance indicators." *Id.* As to the due process question, the court reasoned that the appellants had not been denied the right to take part in the public education system, but that the test requirement was ensuring that they received a benefit from the system before leaving. *Id.* In any event, the court found that more than enough notice of the achievement test had been given to students and parents. *Id.* The court also found no merit in the appellant's charge that they had been denied equal protection. *Id.* Looking to the administration of the requirement in Tattnal County rather than statewide, the court found it uniformly applied. *Id.* at 273.

[45] *Anderson*, 520 F. Supp. at 476-77.

diploma sanction violated the students' right to due process of law because it had not been established that the items on the test were actually taught in the schools.[46]

In addressing these issues, the court found that although the success rate of black students was less than that of white students, insufficient evidence of discriminatory intent was offered to establish a violation of the equal protection clause. In addition, the court held, "[I]nsofar as the poor performance of the black children is attributable to their participation in the dual system, the diploma sanction must fall. It cannot be constitutionally imposed on those who attended classes in the dual system."[47] The court also found that the diploma sanction, since it was unconstitutional, violated Title VI and the Equal Educational Opportunities Act.[48] Citing the Fifth Circuit's decision in *Debra P.*, the court found a protectable property interest in high school graduation for students for whom the graduation requirements had changed, holding that "[i]n the case at bar, a notice period of more than two years, the provision that the test may be retaken, and the provision of remedial courses considered together are not constitutionally inadequate."[49] Finally, the court praised school authorities for their reliance on a well-established testing instrument. But again, citing *Debra P.*, the court held that the school authorities had not demonstrated that the items on the CAT were actually taught in the schools.[50]

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[46] *Id.* at 477.

[47] *Id.* at 500.

[48] *Id.* at 503. Reasoning that the diploma policy violated the equal protection clause of the fourteenth amendment, the court concluded that the policy also violated Title VI of the Civil Rights Act of 1964. *Id.* Likewise, considering the plaintiff's equal protection claim, the court found that the imposition of the diploma requirement on black students who had previously attended substandard segregated schools and were then subjected to the tracking system in Tattnal County Schools violated the Equal Educational Opportunities Act. *Id.*

[49] *Id.* at 505. The court's view was that notice becomes constitutionally inadequate when it renders rules or regulations unreasonable. *Id.* In view of the judicial system's traditional deference to the educational expertise of school authorities, the court could not hold that the notice was unreasonable. *Id.*

[50] *Id.* at 508. The requirement stated by the court in *Debra P.* was that the test must be a "fair test" of that which was taught. *Id.* The court concluded that where the award of a diploma depended on the outcome of a test, the burden was on the school authorities to show that the test covered only material actually taught. *Id.* The court found that the Tattnal County School District had not sustained its burden. *Id.*

An additional evidentiary hearing on whether the material covered on the CAT had actually been taught by the plaintiffs' school district was held by the United States District Court for the Southern District of Georgia.[51] The court found a review of the developmental materials used in grades one through eight and the remedial materials used in the high school outweighed the other evidence presented. The court stated:

> "[I]n view of a long line of decisions giving great deference to the academic decisions of school authorities and recognizing the problems of justiciability inherent in judicial review of an academic standard, the Court, while placing the burden of proof on school authorities to demonstrate that the exit examination must be a fair test of the material taught in accordance with *Debra P.*, nevertheless determines that some deference is to be given to the authorities' decisions in reviewing that proof. In the Court's opinion, the school authorities met their burden of proof fully and completely."[52]

No further appeals of the preceding cases are anticipated. Therefore, the law is settled in similar fact situations, similarly argued, before similar courts. However, the limits of the factual, legal, and judicial circumstances of the cases remain to be determined. Not all functional literacy problems are the same, and not all courts view facts in the same way. New law may certainly arise from factual or judicial differences. The remainder of this article discusses legal issues that have yet to be resolved by the courts. It is these remaining issues that most strongly suggest the potential for new law with respect to functional literacy examinations.

III. Equal Protection Issues

Certain equal protection issues appear to be resolved. Functional literacy examinations are not in themselves arbitrary, unreasonable or unrelated to the reasonable purpose of improving

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[51] *Anderson*, 540 F. Supp. at 761. The court agreed to the additional hearing because the court, as well as the defendants, were unaware that the school district had the burden of proof. *Id.* It was not until the Fifth Circuit's decision in *Debra P.* that the nature of the burden of proof was resolved.

[52] *Id.* at 765.

> proportionate results need not be intimately direct in order to be unfairly or unconstitutionally burdensome. More importantly, a court should place less emphasis on whether a student was and was not actually involved in past segregation and more emphasis on critically analyzing the nature of the burdens imposed on black students due to their disproportionate failure rate.[64]

Both lines of argument support further testing of the past discrimination issue.

The cases reviewed have resolved basic legal issues concerning test bias as well as the content, construct, and curricular validity of functional literacy examinations. The application of these issues to particular tests may prompt refinement of the applicable standards. More interesting, however, are several additional validity questions.

For example, the meaning of the construct "functional literacy" has been questioned by several commentators. One scholar, Young, states that if the construct is not defined specifically, its use is subject to constitutional and statutory challenges.[65] Young and McClung point out that certain definitions of functional literacy may be unteachable or unmeasurable, and thus invalid.[66] McCarthy has stated that "[i]t would be interesting" to see a suit challenge a pregraduation examination on the ground that it is not a valid predicator of life success.[67] Pullin has raised a more technical point:

> The problem of curricular match is compounded when the [functional literacy examination] attempts to test the ability of students to apply basic [academic] skills in "real world" situations. The intent of the testers to measure the application of skills is laudable. But test-makers should take care that the real-world context that they provide does not confound students who could otherwise perform the underlying skill. For example, a student who has never seen a federal income tax

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[64] Yoerges, *supra* note 62, at 407.

[65] Young, *Legal Aspects of Minimum Competency Testing in the Schools*, 16 LAND & WATER L. REV. 561, 561 (1981).

[66] *Id.* at 577-82; McClung, *supra* note 2, at 651.

[67] McCarthy, *Newsnotes: Testing Students May Raise Issues for Reformers*, 68 PHI DELTA KAPPAN 484 (1987).

> form may well be so confused by it that he or she will be unable to demonstrate the basic ability to add, subtract, or divide.[68]

Even valid prediction can be confused by mechanical shortcomings of the tests themselves.

The "concurrent validity" of a given definition of functional literacy may also be subject to challenge. Such a test of validity might require, at the minimum, agreement among knowledgeable people acting independently as to the meaning of the construct.

IV. Due Process Issues

The cases reviewed indicate that several due process issues are resolved. For example, a protectable property interest in graduation from high school exists when students who have fulfilled all requirements for graduation must suddenly satisfy an additional requirement.[69] Students also possess a protectable liberty interest in being free of the stigma as well as the psychological and economic consequences of being found functionally illiterate.[70] Either interest requires rational action by state officials, including sufficient notice to all persons affected.[71]

However, an interesting due process issue concerning the establishment of passing scores remains unresolved. Pryor argues that to avoid arbitrariness such a standard-setting technique must demonstrate a "conceptual relation between the method and the existence of minimum competency."[72] One questionable technique that Pryor identifies is for officials to let political or financial factors determine the passing score.[73] McClung takes note of the "inherently subjective and political nature of setting [such] standards."[74] A second questionable technique identified

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[68] Pullin, *Minimum Competency Testing and the Demand for Accountability*, 63 Phi Delta Kappan 20, 211 (1981).

[69] Debra P. v. Turlington, 644 F.2d 397, 403-04 (5th Cir. 1981).

[70] Brookhart v. Illinois State Bd. of Educ., 697 F.2d 179, 184-85 (7th Cir. 1983).

[71] *Debra P.*, 644 F.2d at 406.

[72] Pryor, *Student Competency Testing in Texas*, 16 St. Mary's L.J. 903, 920 (1985).

[73] *Id.*

[74] McClung, *supra* note 2, at 671.

by Pryor is selection of the passing score based on the distribution of test scores and on a certain percentage of students who should pass.[75] Neither technique meets the test of rationality.

V. Statutory Issues

Certain statutory issues also appear to be resolved. Ordinary rules of statutory construction can be used to determine the authority of the state legislature or local school officials to establish a diploma sanction.[76] It is further settled that discrimination under the equal protection clause will also violate Title VI of the Civil Rights Act of 1964 and the Equal Educational Opportunities Act of 1976.[77]

New ground could be broken when functional literacy examinations are challenged directly under federal discrimination law. Benjes has identified three possible Title VI theories: an effects test borrowed from employment testing, a vestiges-of-segregation test, and a test based on intent to discriminate.[78] Teicher, relying on bilingual-education cases and HEW guidelines, has found authority for requiring special assistance for minority students who fail a functional literacy examination.[79] The weakness of unsuccessful equal protection arguments may not be fatal if raised in a statutory context.

VI. First Amendment Issues

The cases to date do not address first amendment issues. Clague has succinctly described the potential for such challenges:

> Possible first amendment challenges may arise if comprehensive views of the mission of education are linked to student accountability and translated into test items designed to assess the appropriateness or correctness of attitudes, opinions or even behavior. The state's interest in scoring student values on

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[75] Pryor, *supra* note 72, at 920.

[76] Debra P. v. Turlington, 644 F.2d 397, 402-03 (5th Cir. 1981).

[77] Anderson v. Banks, 520 F. Supp. 472, 503 (S.D. Ga. 1981).

[78] Benjes, *The Legality of Minimum Competency Test Programs Under Title VI of the Civil Rights Act of 1964*, 15 Harv. C.R.-C.L. L. Rev. 537, 542-43 (1980).

[79] Teicher, *supra* note 59, at 50-51.

> matters of politics, beauty, parenting, interpersonal skills, cooperation, attitudes toward school and work, and sexual orientation has been rendered constitutionally suspect by *Barnette* and *Tinker*, and possibly by *Yoder*.[80]

Other commentators have discussed the specific issues of cultural bias, coerced belief, and invasion of privacy.[81] This entirely new area may support challenges to functional literacy examinations which test non-academic performance.

VII. Conclusion

A number of legal issues concerning functional literacy examinations have yet to be resolved. Equal protection issues remain concerning disproportionate impact as evidence of intent to discriminate,[82] remedial instruction for students who fail the test,[83] the continuing effects of racial segregation once desegregation has been achieved,[84] specificity in the definition of functional literacy,[85] the predictive validity of the construct,[86] the technical shortcomings of functional literacy examinations, and validation of the construct by concurrent validity procedures.[87] A due process issue remains concerning the establishment of passing scores.[88] Statutory challenges to functional literacy examinations have yet to be exhausted arising from discriminatory effects, vestiges of segregation, discriminatory intent, and the necessity for special assistance to minority students failing the examination.[89] A variety of first amendment expression grounds are available to those who would challenge certain functional lit-

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[80] Clague, *Competency Testing and Potential Constitutional Challenges of "Everystudent,"* 28 Cath. U.L. Rev. 469, 507 (1979).

[81] *See, e.g.*, Comment, *Minimum Competency Testing — Redundancy or Necessity? An Analysis of the Educational and Legal Issues*, 15 Akron L. Rev. 91, 91 (1981); Young, *supra* note 65, at 572; Logar, *supra* note 2, at 35; McClung, *supra* note 2, at 666.

[82] *See supra* note 56 and accompanying text.

[83] *See supra* note 59 and accompanying text.

[84] *See supra* note 62 and accompanying text.

[85] *See supra* notes 65-67 and accompanying text.,

[86] *See supra* note 66 and accompanying text.

[87] *See supra* note 68 and accompanying text.

[88] *See supra* note 72 and accompanying text.

[89] *See supra* notes 70-71 and accompanying text.

eracy examinations.[90] Functional literacy examinations are legally vulnerable to a variety of attacks. Policy makers would be wise to consider these legal issues as they develop, review, or revise functional literacy examination programs.

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[90] *See supra* note 80 and accompanying text.

SEX DISCRIMINATION IN PUBLIC EDUCATION

*Carolyn Ellis Staton**

Discrimination on the basis of sex has historically been rampant in this country's public schools.[1] Yet it was in the aftermath of two of the great social movements of the 1960's, the civil rights movement and the women's movement, that sexual bias became a major policy issue in America.[2] In the initial efforts to eliminate sexual bias in critical areas of American society, those trying to achieve equality in education patterned their efforts after the civil rights' movement, focusing on expansion of the fourteenth amendment's equal protection doctrine.[3] Spurred by national concern, Congress began to focus on discrimination in education based on sex, resulting in the passage of Title IX of the Education Act Amendments of 1972, the primary tool defining equal educational opportunities on the basis of sex.[4]

In keeping with this policy, Congress also amended at least three major statutes to alleviate sex discrimination in education, the most important being the amendment of Title VII of the 1964 Civil Rights Act to include as a protected class employees

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[1] *See, e.g.*, Berkelman v. San Francisco Unified School Dist., 501 F.2d 1264 (9th Cir. 1974)(public secondary admissions quotas based on sex); Burkey v. Marshall County Bd. of Educ., 513 F. Supp. 1084 (N.D. W. Va. 1981)(lower pay for coaches of girls' athletic teams).

[2] R. SALOMONE, EQUAL EDUCATION UNDER LAW 143 (1986). The success of racial minorities encouraged women to seek reform through legislative and judicial action. *Id.* Women who had participated in the antiwar and civil rights movements acquired skills in organizing group pressure to effect social change. *Id.*

[3] *Id.*

[4] Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (1976). Section 1681 states: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ." *Id.*

of educational institutions.[5] Additionally, in 1972 Congress amended both the Equal Pay Act of 1963[6] and the Public Health Service Act,[7] the former to deter discrimination against professional employees and the latter to insure equality in admissions to health education programs, including medical schools.[8]

Since there exist no Mississippi anti-discrimination statutes providing protection against sex discrimination in schools, aggrieved persons in Mississippi must rely upon either the United States Constitution[9] or upon federal statutes, primarily Title IX, for protection. Therefore, this paper will focus on the federal statutory and constitutional provisions for eliminating sex discrimination.

I. Statutory and Constitutional Basis for Discrimination Claims

A. Title IX

Congress enacted Title IX to encourage equal treatment of both sexes in education.[10] The act, which prohibits sex discrimination in programs receiving federal financial assistance, has two core provisions, modeled after Title VI of the 1964 Civil Rights Act.[11] The core provisions include section 901(a),[12] a program-specific ban on sex discrimination in education, and section 902,[13] authorizing promulgation of regulations to secure compli-

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[5] Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (1970).

[6] Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1982).

[7] Public Health Service Act, 42 U.S.C. § 292(d) (1982).

[8] *See* Arnold, Legal Considerations in the Administration of Public School Physical Education and Athletic Programs 298-99 (1983).

[9] Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 722 (1982)(using equal protection clause of fourteenth amendment to uphold plaintiff sex discrimination claim).

[10] *See supra* note 4.

[11] Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d) (1982). Section 2000(d) prohibits discrimination in federally assisted programs on the basis of race. *Id.*

[12] 20 U.S.C. § 1681(a) (1982). *See supra* note 4.

[13] 20 U.S.C. § 1682 (1982). Section 902 provides in part:

> Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity . . . is authorized and directed to effectuate the provisions of section 1681 of this title with respect to such program or activity by issuing rules, regulations, or orders of general ap-

ance with section 901(a) and termination of federal funding if compliance is not voluntary. The chief impact of Title IX has been in forcing schools to comply with the law, an impact so effective that Title IX has not spawned a great deal of litigation.

As a result of the small body of interpretative law, one must look not only at Title IX, but also at an analogous law, Title VI of the 1964 Civil Rights Act, in order to understand or predict Title IX.[14] Even though Title VI served as the model for Title IX, the acts are not identical as some major differences exist between the two statutes.[15] For instance, Title VI is broader, forbidding racial *and* ethnic discrimination. Moreover, unlike Title IX, which is restricted to discrimination in education programs, Title VI's prohibitions extend to *any* kind of program receiving federal financial assistance.[16]

The enforcement portion of Title IX results from the constitutional inability of the federal government to make direct educational policy. Since the federal government is limited to indirect policy-making through its power to appropriate money,[17] the anti-discrimination provisions of Title IX can be enforced effectively by the government only through termination of federal funds to a discriminating institution.[18] It follows, then, that if an institution is not receiving federal funds, Title IX can have no such punitive effect.

The responsibility for enforcing Title IX lies with the Office of Civil Rights (OCR) in the Department of Education.[19] OCR has the responsibility for resolving complaints arising under the statute, reviewing compliance plans, and seeking termination of federal funds if an institution should fail to comply with the

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plicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the activity is taken.

Id.

[14] Salomone, *supra* note 2, at 124.

[15] *Id.*

[16] *Id.*

[17] U.S. CONST. art. I, § 9.

[18] Note, *Federal Legislation Prohibiting Sex Discrimination in Employment, Education, and Credit*, 1 N.Y. SCH. L. HUM. RTS. J. 197, 232 (1983).

[19] Salomone, *supra* note 2, at 124.

statute.[20] The federal regulations empower the OCR to make both periodic compliance reviews[21] and investigate complaints.[22]

Title IX expressly imbues the federal government with authority to file legal action against noncomplying institutions.[23] However, courts have interpreted Title IX as permitting, additionally, a private cause of action. In *Cannon v. University of Chicago*,[24] the United States Supreme Court recognized that a private cause of action is implied in Title IX.[25] Of course, if a complainant filed an action under Title IX, she or he would generally be seeking a remedy other than termination of federal funds to the offending institution. The flexibility of suing privately means that a complainant does not have to wait for the federal government to take any action and that the aggrieved party may seek a remedy which gives more appropriate relief for her claim than does a termination of funds. In *Cannon* the Court indicated that it preferred individual relief over fund termination in private right of action cases.[26] One remedy that a plaintiff with a private cause of action might desire would be monetary damages. However, it is questionable whether a successful plaintiff can be awarded monetary damages.[27] It is more likely that courts would provide the aggrieved party with injunctive relief.

A major question concerning the extent of the government's enforcement powers under Title IX was addressed in 1984 by the United States Supreme Court in *Grove City College v. Bell*.[28] At issue was whether the federal government could terminate federal assistance to an entire institution when only a specific program of the institution was discriminating in violation of

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[20] *Id.*

[21] 20 C.F.R. § 100.7(a) (1984).

[22] 34 C.F.R. § 100.7(b) (1984).

[23] 20 U.S.C. §§ 1682-83 (1982).

[24] 441 U.S. 677 (1979).

[25] *Id.* at 709.

[26] *Id.* at 708.

[27] *See* Lieberman v. University of Chicago, 660 F.2d 1185, 1188 (7th Cir. 1981) (holding that Congress, not courts, should fashion additional remedy if one is needed), *cert. denied*, 456 U.S. 937 (1982).

[28] 465 U.S. 555 (1984).

Title IX.[29] The Supreme Court held in *Grove City College* that Title IX permitted termination of funds only to the specific programs which discriminated and did not permit termination of funds to the entire institution. This decision was roundly criticized as there was rather clear legislative history showing that Congress, in promulgating the statute, had intended that the funds to the entire institution be curtailed even if only a specific portion or program of that institution was in noncompliance.[30] As a practical result of *Grove City College*, a school might discriminate in some areas, such as athletics, without any government reprisals as long as the discriminatory programs were not receiving federal financial assistance.

Immediately following the decision, Congress moved to amend Title IX to include express language which would overrule the *Grove City College* case. In the 1987 Civil Rights Restoration Act Congress explicitly amended Title IX to reverse the holding in *Grove City College*.[31] As a result of that amendment, an institution now faces termination of funds to the whole institution should any program in the institution, regardless of whether the program is a direct or indirect beneficiary of federal financial assistance, discriminate on the basis of sex.[32]

B. Equal Protection

Another potent — and, relatively recent — weapon for combatting sex discrimination is the equal protection clause of the fourteenth amendment.[33] Prior to 1971, the United States Supreme Court used a two-tiered equal protection analysis. The traditional standard for analyzing claims of inequality had been

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[29] *Id.* at 570-71. *Grove City College* had two major issues. The other issue was whether the receipt of Basic Opportunity Education Grants by its students constituted indirect aid to the college, and, if so, whether Title IX was applicable to institutions which did not receive direct federal aid but which did receive indirect aid. The Court found that the school was the indirect beneficiary of the federal aid, and that, therefore, Title IX did apply to the college. *Id.* at 563.

[30] *Sex Discrimination Regulations: Hearings Before the Subcomm. on Post-Secondary Education of the House Comm. on Education and Labor*, 94th Cong., 1st Sess. 180 (1975).

[31] Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988).

[32] *Id.*

[33] U.S. CONST. amend. XIV, § 1.

to determine whether the state had some rational basis for creating different classifications or, said another way, for discriminating between two classes. As long as the state could show a non-arbitrary reason, a rational relationship was said to exist between the classification, the means, and the legitimate ends that were served by it.[34] All in all, the standard was a minimal one, with the burden of proof falling on the plaintiff.

As equal protection theory evolved, the Court fashioned a higher level of scrutiny for classifications which were based on race. Since racial discrimination was the historical reason for the passage and ratification of the fourteenth amendment, the Court reasoned that racial classifications were inherently suspect.[35] Because of the suspect nature of racial classifications, the Court determined that they must be subjected to a higher level of scrutiny. Race-based classifications can withstand scrutiny only if the state has a *compelling* interest in the legitimate goals that are served, and if there are no other less drastic methods of achieving those goals.[36] Unlike cases involving the traditional equal protection analysis, in cases involving strict scrutiny, the burden is on the defendant.

Until 1971, the Court decided all equal protection claims brought by plaintiffs alleging sex discrimination by applying the rational relationship test. As a result, the complainant in each and every case lost, the Court always upholding some state basis as rational.[37] However, in 1971 in the landmark case of *Reed v. Reed*, the Court for the first time held that a state statute which made classifications on the basis of sex violated the fourteenth amendment.[38] Although not entirely clear, it appeared that the

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[34] Railway Express Agency v. New York, 336 U.S. 106, 117 (1949).

[35] *See* Loving v. Virginia, 388 U.S. 1, 12 (1967)(freedom of choice to marry could not be subject to invidious racial discrimination); McLaughlin v. Florida, 379 U.S. 184, 196 (1964)(cohabitation statute invalidly denied equal protection under Constitution). *But see* Korematsu v. United Sates, 323 U.S. 214, 222 (1944)(exclusion of Japanese from west coast areas).

[36] *See Loving*, 388 U.S. at 11 (racial classifications, subjected to "most rigid scrutiny," upheld only if accomplishing permissible state objective).

[37] *See* Hoyt v. Florida, 369 U.S. 57, 64 (1961)(upholding Florida statute according women exemption from jury service unless waived); Goesaert v. Cleary, 335 U.S. 464, 467 (1948)(Court upheld state statute prohibiting licensing of women as bartenders).

[38] 404 U.S. 71 (1971).

Court applied the lower level of scrutiny, the rational relationship test, to strike the Idaho intestate statute at issue in the case.[39]

Shortly after the *Reed* decision, the Court came close to declaring that sex was a suspect classification. However, the decision at hand, *Frontiero v. Richardson*, did not command a majority decision.[40] Ultimately the Court moved away from declaring sex a suspect classification, choosing instead to develop a new level of scrutiny applicable in sex-based discrimination cases. That test, an intermediate level of scrutiny, was first stated in *Craig v. Boren*[41] and later reaffirmed in *Mississippi University for Women v. Hogan*.[42] Under the intermediate level of scrutiny, a sex-based classification may be permitted only if a *substantial*, rather than a rational, governmental interest is served.[43] Using the *Craig v. Boren* test, it is somewhat easier for plaintiffs to succeed in an equal protection case than it was previously.

II. Types of Sex Discrimination in Education

A. Admissions

For several years before the passage of Title IX, challenges under the fourteenth amendment's equal protection clause to the admission policies of single-sex schools and colleges began to arise. The first challenges by women were unsuccessful.[44] Men also challenged the admission policies of state single-sex schools excluding them, although initially, to no avail.[45]

Many of the earliest challenges involved state colleges or

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[39] *Id.* at 75-77.

[40] 411 U.S. 677, 691 (1973).

[41] 429 U.S. 190, 197-98 (1976).

[42] 458 U.S. 718, 723-25 (1982).

[43] *Craig*, 429 U.S. at 197-98.

[44] *See* Heaton v. Bristol, 317 S.W.2d 86, 100 (Tex. Civ. App. 1958) (single-sex admission policy at state university found not to violate equal protection clause), *cert. denied*, 359 U.S. 230 (1959).

[45] *See, e.g.*, Williams v. McNair, 316 F. Supp. 134 (D. S.C. 1970) (legislative classification using rational basis not violative of equal protection clause), *aff'd mem.*, 401 U.S. 951 (1971).

universities.[46] However, attacks on single-sex lower schools occurred as well, both in state courts and federal courts.[47] While sex segregation of two single-sex secondary schools was upheld in *Vorchheimer v. School District*,[48] different admission policies for co-educational schools have not withstood constitutional challenges.[49] Even when the schools were not co-educational, but the same public entity governed and used different academic criteria for males and females for admission, a constitutional violation has been found.[50]

The landmark single-sex school case is *Mississippi University for Women v. Hogan*.[51] In *Hogan*, the Court upheld the male plaintiff's equal protection challenge.[52] Using the interme-

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[46] *See Heaton*, 317 S.W. 2d at 100 (in suit by women to enter Texas A & M, all-male public institution, Texas Court of Civil Appeals denied plaintiffs' claim, holding no constitutional right violated), *cert. denied*, 339 U.S. 230 (1959). The issue later arose in Kirstein v. Rector & Visitors of the Univ. of Va., 309 F. Supp. 184 (E.D. Va. 1970). In *Kirsten*, female plaintiffs sued to enter the all-male University of Virginia. *Id.* at 185. The district court dodged the equal protection issue, claiming that the case was moot since the University of Virginia had voluntarily agreed to admit women. *Id.* at 188. In Williams v. McNair, the issue was confronted directly. *Williams*, 316 F. Supp. at 136-37. Male plaintiffs sought admission to Winthrop College. *Id.* at 135. At that time South Carolina operated two single-sex institutions, Winthrop for women, and the Citadel, a military-type school, for men. *Id.* at 136. Applying the rational relationship test, the district court held that the state's college structure did not violate the fourteenth amendment. *Id.* at 138.

[47] *See, e.g.*, Vorchheimer v. School Dist. of Philadelphia, 532 F.2d 880, 888 (3d Cir. 1976) (gender-based classifications for high school admissions upheld), *aff'd*, 430 U.S. 703 (1977); Berkelman v. San Francisco Unified School Dist., 501 F.2d 1264, 1270 (9th Cir. 1974)(stricter admissions standards for females held violative of fourteenth amendment); Bray v. Lee, 337 F. Supp. 934, 935 (D. Mass. 1972)(males admitted to school over females scoring higher held to be illegal discrimination).

[48] *Vorcheimer*, 532 F.2d at 888. One commentator discusses a later case, Newburg v. Board of Public Education, which resulted in an order that female students be admitted to Central High School. Salomone, *supra* note 2, at 120-22 (citing Newburg v. Board of Pub. Educ., 9 Phil. Cty. Rep. 556, 570 (1983)). The trial court in *Newburg* applied the intermediate level of scrutiny finding that there was no substantial governmental interest in excluding females from Central High School. *Id.*

[49] *Berkelman*, 501 F. 2d at 1270.

[50] *Bray*, 337 F. Supp. at 937.

[51] 458 U.S. 718 (1982).

[52] *Id.* at 733. The plaintiff Hogan was a male registered nurse who wanted to be admitted to the baccalaureate program at the state-supported, all-female Mississippi University for Women. *Id.* at 720. The special training he would receive in the baccalaureate program would enable him to receive a higher salary. *Id.* at 720 n.3.

diate scrutiny test that it first fashioned in *Craig v. Boren*,[53] the Court determined that no substantial state purpose was achieved by the university's exclusion of men from its nursing program. Had the state been able to prove that Mississippi University for Women provided compensatory education for women who had been deprived of an education, its argument would have been more meritorious.[54] However, since nursing as both a practical discipline and as an academic study has traditionally been a part of the woman's domain, the state's argument that the school's single-sex admission policy compensated women for past discrimination lacked credibility[55]

With regard to eliminating different admission standards, Title IX affects only certain types of institutions. For instance, in the area of admissions, the statute is applicable only to vocational education, professional and graduate education, and public undergraduate institutions.[56] This essentially exempts public and private elementary and secondary schools and private undergraduate schools, and historically single-sex public undergraduate schools from compliance with the act.[57] Although these institutions are specifically exempted by the statute, there is still the possibility that discrimination in admissions by any of the excepted categories can not withstand a constitutional challenge.[58]

Additionally, under some circumstances sex segregation might be attacked under the Equal Educational Opportunities Act (EEOA).[59] The EEOA prohibits the denial of equal educational opportunity on the basis of race, sex, or national origin.[60]

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[53] 429 U.S. 190 (1976).

[54] *Id.* at 729.

[55] *Id.*

[56] 20 U.S.C. § 1681(a)(1) (1976).

[57] The continued validity of this last provision after *Hogan* is dubious.

[58] *See, e.g., Hogan*, 458 U.S. at 732 (Congress' power to enforce fourteenth amendment limited to adoption of measures protecting guarantees, rather than restricting or diluting them).

[59] 20 U.S.C. §§ 1701-1758 (1976).

[60] *Id.* § 1703(a). The Equal Educational Opportunites Act (EEOA) states in pertinent part: "[n]o state shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin by (a) the deliberate segregation by an educational agency of students on the basis of race, color, or national origin among or within schools. . . ." *Id.*

United States v. Hinds County School Board illustrates the impact of the EEOA.[61] This case involved a 1969 desegregation plan devised by Amite County, Mississippi, which assigned students to schools on the basis of sex.[62] This school reorganization scheme provided Amite County with two boys' schools and two girls' schools.[63] Amite County argued that its school redistricting plan was motivated by sound educational principles and not by racial concerns.[64] The court stated that Congress's purpose in enacting the EEOA was based on a determination that "the maintenance of dual school systems in which students are assigned to schools solely on the basis of race, color, sex, or national origin denies to those students the equal protection of the laws guaranteed by the fourteenth amendment. . . ."[65] The court noted that sex segregation of a school district resulted in the kind of dual school system with the attendant harm that the EEOA was designed to eliminate.[66]

The Act defined segregation as "the operation of a school system in which students are wholly or substantially separated among the schools of an educational agency on the basis of race, color, sex, or national origin."[67] The Fifth Circuit resolved some statutory ambiguities by declaring that within a school system, the statute prohibits student assignments to various schools on the basis of race, color, sex, or national origin.[68] On the other hand, within a single school, the EEOA prohibits only segregation on the basis of race, color, or national origin; it does not prohibit sex segregation.[69] Nonetheless, while the EEOA may not prohibit sex segregation within a single school, Title IX may prevent sex segregation of classes.

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[61] 560 F.2d 619 (5th Cir. 1977).

[62] *Id.* at 621.

[63] *Id.*

[64] *Id.* at 623.

[65] *Id.* (citing 20 U.S.C. § 1702(a)(1) (1982)).

[66] *Hinds County School Bd.*, 560 F.2d at 623.

[67] 20 U.S.C. § 1720(c)(1982).

[68] *Hinds County School Bd.*, 560 F.2d at 624.

[69] *Id.*

B. Vocational Education

One of the major forms of sex discrimination in education has been in the area of vocational education, available at various levels of education. In vocational education programs, often referred to as "vo-tech", it has been customary for women to be channeled into clerical and domestic programs in preparation for work in these typically low-paying occupations. Men, on the other hand, have been steered into the training programs for technical, trade, and crafts occupations, generally higher paid occupations. This form of sex segregation has been a result, in part, of society's stereotypical thinking about the proper work roles for men and women.

Title IX explicitly prohibits sex discrimination in admission to vocational education programs, regardless of the level at which such programs are offered.[70] In those instances where single-sex elementary and secondary schools might be countenanced under Title IX, Title IX requires that the vocational education offerings at the boys' and girls' schools be comparable.[71] Thus, a carpentry course offered at a boys' school also must be available at a girls' school.

C. Dress Codes

As originally implemented, federal regulations under Title IX prohibited discrimination in grooming rules.[72] During the time that this specific regulation was in effect, apparently only one case was decided under it. *Trent v. Perritt*,[73] a case arising in Mississippi, involved a student who wished to wear his hair longer than permitted by his school's grooming code.[74] The district court upheld the dress code, declaring that the regulation did not constitute sex discrimination pursuant to Title IX.[75] The

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[70] 20 U.S.C. § 1681(a)(1)(1982).

[71] *Id.*

[72] 34 C.F.R. § 106.31(b)(5)(1982). The pertinent portion of Title IX states that "in providing any aid, benefit, or service to a student, a recipient shall not, on the basis of sex. . .[d]iscriminate against any person in the application of any rules of appearance." *Id.* (repealed by 47 FED. REG. 32526 (1982)).

[73] 391 F. Supp. 171 (S.D. Miss. 1975).

[74] *Id.*

[75] *Id.* at 173.

court's decision was consistent with the approach taken by courts in determining whether dress codes constitute sex discrimination under Title VII of the 1964 Civil Rights Act, relating to employment discrimination.[76]

During the Reagan Administration the federal regulation governing dress codes was withdrawn.[77] Although some commentators believe that a challenge under Title IX might still be viable,[78] Title IX has been rendered largely ineffective as a method of challenging dress codes. Nonetheless, discriminatory dress codes may still be challenged on constitutional grounds. However, constitutional objections to hair codes have a mixed success rate.[79] Apparently only one case directly challenged a school appearance code on the basis of impermissible sex discrimination under the fourteenth amendment, and that challenge prevailed.[80]

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[76] *See, e.g.*, Fountain v. Safeway Stores, Inc., 555 F.2d 753, 756 (9th Cir. 1977)(employee's discharge for failure to wear necktie did not constitute sex discrimination); Barker v. Taft Broadcasting Co., 549 F.2d 400, 401 (6th Cir. 1977)(grooming code permitted by court); Longo v. Carlisle De Coppet & Co., 537 F.2d 685, 685 (2d Cir. 1976)(termination of male employee for wearing long hair did not violate Title VII); Willingham v. Macon Tel. Publishing Co., 507 F.2d 1084, 1092 (5th Cir. 1975)(grooming code treated both sexes equally, holding them to generally-accepted community standards of dress and appearance).

[77] 47 Fed. Reg. 32,526 (1982). The Secretary of Education amended the Title IX regulation by revoking the section which prohibited discrimination in applying codes of personal appearance. *Id.* The regulation was intended to allow the Department of Education to concentrate on "issues that are more clearly related to the prohibition against sex discrimination." *Id.* at 32,526-27.

[78] N. CAMPBELL, M. GREENBERGER, M. KOHN, & S. WILCHER, 1 SEX DISCRIMINATION IN EDUCATION: LEGAL RIGHTS & REMEDIES 2-63 to 66 (1983).

[79] *See, e.g.*, Holsapple v. Woods, 500 F.2d 49, 52 (7th Cir.)(high school hair code held unconstitutional), *cert. denied*, 419 U.S. 901 (1974); Arnold v. Carpenter, 459 F.2d 939, 944 (7th Cir. 1972)(same); Massie v. Henry, 455 F.2d 779, 783 (4th Cir. 1972)(same); Richards v. Thurston, 424 F.2d 1281, 1286 (1st Cir. 1970)(same). *Contra* Zeller v. Donegal School Dist., 517 F.2d 600, 606 (3d Cir. 1975)(nature of schools held to demand curtailing students' liberties and freedoms); Karr v. Schmidt, 460 F.2d 609, 613 (5th Cir. 1972)(no constitutional right to wear hair in public high school in manner and length suiting wearer); Freeman v. Flake, 448 F.2d 258, 261 (10th Cir. 1971)(courts should allow states to determine hair codes in schools), *cert. denied*, 405 U.S. 1032 (1972).

[80] *See* Crews v. Cloncs, 432 F.2d 1259, 1266 (7th Cir. 1970)(school must satisfy "burden of substantial justification" to exclude long-haired student from school).

D. Student Pregnancy

The unfortunate reality is that teenage pregnancies constitute a significant social problem, a problem compounded by the fact that should the teenage mother quit school she stands a considerable chance of becoming a part of the growing feminization of poverty.[81] It is, therefore, very important, both socially and economically, to see that pregnant students, married students, and student mothers continue their education. Concomitant with this consideration is the concern that such students not be discriminated against by the schools. The federal regulations governing Title IX specifically bars discrimination on the basis of sex with regard to these categories.[82]

Title IX's regulations further provide that a school shall not discriminate against any such students or exclude them from either curricular or extracurricular activities on the basis of pregnancy, childbirth, or post-pregnancy recovery. However, if the school has a separate program for mothers and mothers-to-be, the student may request voluntarily that she be allowed to participate in the separate program.[83] If a school does offer a separate program for mothers and mothers-to-be, the instructional portion of that program must be comparable to what is offered to non-pregnant students.[84] When a separate program exists, student participation must be completely voluntary. A school cannot force a student to obtain a physician's certificate that she is physically or emotionally capable of remaining in normal clas-

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[81] The phrase "feminization of poverty" has become part of the vernacular of middle-class feminists. Fox-Genovese, *Women's Rights, Affirmative Action, and the Myth of Individualism*, 54 GEO. WASH. L. REV. 338, 345 n.23 (1986).

[82] 34 C.F.R. § 106.40(a) (1987). The regulation provides that a recipient should not be treated differently on the basis of sex because of her "actual or potential parental, family, or marital status." *Id.* Additionally, the regulation requires that:

> A recipient shall not discriminate against any student, or exclude any student from its education program or activity, including any class or extracurricular activity, on the basis of such student's pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom, unless the student requests voluntarily to participate in a separate portion of the program or activity of the recipient.

Id. § 106.40(b)(1).

[83] *Id.* § 106.40(b)(1).

[84] *Id.* § 106.40(b)(3).

ses unless it requires other students to obtain a physician's certificate when receiving medical attention.[85] Furthermore, a school must give the student a leave of absence for as long as her physician considers it necessary. If the student takes a leave of absence, she must be reinstated at the point she was when she took the leave.[86]

Very little litigation under Title IX exists concerning pregnant students.[87] However, litigants have successfully challenged rules which discriminate on the basis of pregnancy or motherhood on constitutional grounds. In 1969 in *Perry v. Grenada Municipal Separate School District*[88] the federal district court held that Grenada could not exclude female students from school solely on the ground that they were unwed mothers.[89] Finding a violation of the equal protection clause of the fourteenth amendment, the court held that before the school district could exclude them, unwed mothers had a right to a hearing to determine their moral fitness to return to school.[90] Indeed, there seemed to be a presumption that unwed mothers were allowed to be readmitted *unless* there was a hearing proving that they lacked sufficient moral character to be in school. Proof that the unwed mothers were so morally deficient that they should not be admitted to school should be virtually impossible for a school district to substantiate. Implicit in *Perry* is the notion that it is, under some circumstances, constitutionally permissible to ban pregnant girls from school.[91] Despite this implication, Title IX

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[85] *Id.* § 106.41(b)(2).

[86] *Id.* § 106.41(b)(5).

[87] *See* Wort v. Vierling, 778 F.2d 1233, 1235-36 (7th Cir. 1985)(affirming order awarding costs to unwed mother discriminated against in dismissal from National Honor Society).

[88] 300 F. Supp. 748 (N.D. Miss. 1969). *See also* Shull v. Columbus Mun. Sep. School Dist., 338 F. Supp. 1376, 1378 (N.D. Miss. 1972)(students may not be excluded from school solely because they are unwed mothers).

[89] *Perry*, 300 F. Supp. at 753.

[90] *Id.*

[91] *Id.* at 752. The Court noted that it understood and appreciated the effect that an unwed pregnant girl could have on other students. *Id.* However, it reasoned that "after the girl has the baby and has the opportunity to realize her wrong and rehabilitate herself, it seems patently unreasonable that she should not have the opportunity to go before some administrative body of the school and seek readmission on the basis of her changed moral and physical condition." *Id.*

should effectively prevent such an exclusion.

Other cases in which pregnant students have sought to remain in school are consistent with the *Perry* decision. In *Ordway v. Hargraves*,[92] the court held that a school's requirement that a pregnant student cease to attend classes violated the Civil Rights Act.[93]

E. Sexual Harassment

Although the problem of sexual harassment on college and university campuses has been a more widely documented concern,[94] sexual harassment at the lower school level constitutes an equally disturbing problem. The case of *Alexander v. Yale University*[95] is important for its determination that sexual harassment of students is a form of sex discrimination prohibited by Title IX.[96]

Pursuant to Title VII of the Civil Rights Act, the Equal Employment Opportunity Commission promulgated federal guidelines concerning sexual harassment, including a definition.[97] These guidelines are generally regarded as applicable under a Title IX claim as well. Sections 1 and 2 of these guidelines are easily adaptable to academia. The underlying rationale of both sections is the concern that the employer has dominance over the employee in the workplace. Likewise, in the educational context the teacher has power over the student.

The Title VII guidelines provide:

> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute

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[92] 323 F. Supp. 1155 (D. Mass. 1971).

[93] *Id.* at 1158.

[94] *See* Ingulli, *Sexual Harassment in Education*, 18 RUTGERS L.J. 281, 285 (1987)(discussion of legal and other responses to problems of sexual harassment at university level); Crocker, *Annotated Bibliography on Sexual Harassment in Education*, 7 WOMEN'S RTS. L. REP. 91, 92 (1982)(listing publications dealing with sexual harassment in education).

[95] 631 F.2d 178 (2d Cir. 1980). Plaintiff alleged that her grade of "C" in a course was the result of her rejecting the sexual advances of her teacher. *Id.* at 182. Plaintiff lost because her claim was not substantiated. *Id.* at 185.

[96] *Id.*

[97] 29 C.F.R. § 1604.11(a) (1988).

> sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.[98]

Title IX requires that all schools covered under its provisions have a grievance procedure for sex discrimination complaints.[99] In theory, this established grievance procedure can be used for any type of complaint arising under Title IX. However, experience at some institutions has shown that sex harassment complaints are better processed under a specially designed grievance procedure rather than the general Title IX grievance procedure. While Title IX does not require a separate grievance procedure for sexual harassment claims, there is some merit to this contention. For example, a female student may be reluctant to complain to a male employee that a male teacher has sexually harassed her. The young woman, possibly already ill at ease about making the complaint, may feel less awkward discussing the problem with a female employee. A separate procedure for sexual harassment claims could insure that personnel of the same sex were available to assist the student with the problem. Furthermore, a separate procedure could be designed to guarantee anonymity to the complainant and to protect the alleged offender until such time as there might be a finding against the offender.

In addition to the possibility of bringing a sexual harassment complaint under Title IX, a complainant in Mississippi may seek to have criminal charges brought against a teacher where there have been actual sexual relations between the teacher and the student.[100] However, the statute is of limited utility since it penalizes only certain conduct and, therefore, is not a relevant concern in most forms of sexual harassment.

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[98] *Id.*

[99] 34 C.F.R. § 106.8 (1988).

[100] MISS. CODE ANN. § 97-29-3 (1972 & Supp. 1988).

Since *Alexander*, Title IX has been an available remedy for victims of sexual harassment. It seems that injunctive relief in a private action might be the most effective remedy for a student who is a victim of sexual harassment. School employees who are the victims of sex harassment, on the other hand, have the choice of filing a complaint under either Title VII or Title IX, a choice likely based on the remedy sought.[101]

F. Athletics and Sex Discrimination

The area which has received the most attention both under the fourteenth amendment and Title IX is school athletics. Before the passage of Title IX only a small percentage of girls was involved in high school athletics. By the end of the 1970s the percentage of girls participating in athletics had risen dramatically.[102] But the road to equal opportunity in school athletics has not been easy. From the very beginning it was obvious that the real controversy of Title IX centered on school sports. In 1974 at a press conference held to announce the release of proposed federal regulations to Title IX, then Secretary of Health, Education, and Welfare Casper Weinberger stated that not until that very moment did he realize that athletics was the single "most important subject in the United States today."[103] To say the least, sexist attitudes have been pervasive in this area. As one jurist noted, "Athletic competition builds character in boys. We don't need that kind of character in our girls, the women of tomorrow."[104]

The regulations which were finally promulgated specifically prohibit discrimination in athletics:

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[101] *See* North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 532-36 (1982) (recognized Title IX prohibits sex discrimination against school employees as well as against students).

[102] In 1970 7.4% of athletes were girls. By 1978-79 this number had risen to almost 32%. N. Campbell, M. Greenberger, M. Kohn, & S. Wilcher, *supra* note 78, at 2-34 & 35 (citing United States Commission on Civil Rights, *More Hurdles to Clear*, 63 Clearinghouse Publication 11-12 (1980)).

[103] A. FISHEL AND J. POTTER, NATIONAL POLITICS AND SEX DISCRIMINATION IN EDUCATION 113 (1977) (quoting U.S. Dep't of Health, Educ. and Welfare, Transcript of Press Briefing of Secretary Caspar Weinberger (June 18, 1974)).

[104] Hollander v. Connecticut Interscholastic Athletic Conf., 164 Conn. Supp. 57 (1971), *appeal dismissed*, 164 Conn. 654, 295 A. 2d 671 (1972).

> No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.[105]

Despite Title IX, most litigation concerning athletic inequities has occurred under the fourteenth amendment. A constitutional violation is usually involved in discrimination against female participation in certain sports. As stated by one court, it is not the right to play a specific sport that is at issue. Rather, it is the right of female athletes to compete and to play if qualified and not to be treated differently than boy athletes.[106] In order to invoke the fourteenth amendment a plaintiff must show that a nexus exists between the action and the discrimination. If it is a school's rule which is discriminatory and the school is a public entity, then there is state action. Likewise, if a public school *district* has a discriminatory rule, there is state action. The more problematic example arises in those cases in which the offensive rule has been promulgated by an athletic association which is not a state agency.[107] In this instance one must examine whether the rule-making association is so interrelated with a state entity or school that a court is likely to find that there is state action.[108]

Those who urge separation of sexes in sports have relied primarily on three basic arguments.[109] The first argument is that it would cost more to have sex-integrated teams. This ground

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[105] 43 C.F.R. § 86.41 (1988).

[106] *See* Reed v. Nebraska School Activ. Ass'n, 341 F. Supp. 258, 262 (D. Neb. 1972) (female student's interest in participating on boys' golf team and receiving instruction outweighed state's interest disallowing participation because of financial savings and prevention of student attacks on rules).

[107] *See, e.g.*, Force v. Pierce City R-VI School Dist., 570 F. Supp. 1020, 1030 (W.D. Mo. 1983) (rules and regulations of high school activities association and manner of promulgation and enforcement thereof constituted state action).

[108] *See* Clark v. Arizona Interscholastic Ass'n, 695 F.2d 1126, 1128 (9th Cir. 1982) (holding that actions by voluntary associations of schools constituted state action), *cert. denied*, 464 U.S. 818 (1983).

[109] Wong & Ensor, *Sex Discrimination in Athletics: A Review of Two Decades of Accomplishments and Defeats*, 21 GONZ. L. REV. 345, 373-74 (1985-86).

has an obvious ring of hollowness. (The cost factor argument has often been reversed and raised when a school fields only a boys' team; the school generally contends that it cannot afford a separate girls' team.)[110] The second reason given is that separate sports are necessary for the safety of female students.[111] Regarding this argument, the court in *Hoover v. Meiklejohn*,[112] a case involving the rights of girls to play on a boys' soccer team, scoffed at the notion of inherent physical inadequacy.[113] The third basis relied upon is that all-girl teams promote girls' athletic skills.[114] Regarding the third argument, the Court of Appeals for the Eighth Circuit in the important early case of *Brenden v. Independent School District 742*[115] noted that the determination of whether mixed sports would be detrimental to the development of girls' athletic skills required too much speculation.[116] This last argument, nonetheless, is often the basis for other courts' refusal to integrate sports teams.[117]

Courts have developed several different methods to handle the exclusion of girls from all-boy teams, depending on the circumstances.[118] For instance, if girls are excluded from a non-

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[110] *But see, e.g., Reed*, 341 F. Supp. at 263 (rejecting argument that school cannot afford dual teams); Haas v. South Bend Community School Corp., 269 Ind. 515, 289 N.E.2d 495, 500 (1972)(same).

[111] *See, e.g.*, Leffel v. Wisconsin Interscholastic Athletic Ass'n, 444 F. Supp. 1117, 1122 (E.D. Wis. 1978)(rejecting safety argument); Yellow Springs Exempted Village School Dist. Bd. of Educ. v. Ohio High School Athletic Ass'n, 443 F. Supp. 753, 758 (S.D. Ohio 1977)(same); Darrin v. Gould, 85 Wash. 2d 859, 540 P.2d 882, 891 (1975)(same).

[112] 430 F. Supp. 164 (D. Colo. 1977).

[113] *Id.* at 169.

[114] ARNOLD, *supra* note 8, at 286.

[115] 477 F.2d 1292 (8th Cir. 1973).

[116] *Id.* at 1302.

[117] *E.g., Leffel*, 444 F. Supp. at 1121 (allowing exclusion of girls from boys' swim team due to different levels of competition); Ritacco v. Norwin School Dist., 361 F. Supp. 930, 932 (W.D. Pa. 1973)(allowing exclusion of girls from boys' tennis team to enhance quality and caliber of sports opportunities for both sexes).

[118] Hetzel, *Gender-Based Discrimination in High School Athletics*, 10 SETON HALL LEGIS. J. 275, 284-90 (1987). According to a federal regulation:

> Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that

contact sport and no counterpart girls' team is provided in that particular sport, courts have been inclined to strike the exclusion.[119] When there is no separate team for girls and the sport involved is a non-contact sport, courts have taken the position that the exclusion of girls from the boys' team violates the equal protection clause.[120] If an athletic opportunity is denied to an entire class, i.e., females, then an educational opportunity is foreclosed to that class. As stated by the court in *Hoover v. Meiklejohn*, "whether it is algebra or athletics, that which is provided must be open to all."[121] On the other hand, in cases involving state action, if the sport involved is non-contact and there are comparable athletic opportunities for males and females, the courts have been willing to uphold the exclusion of girls from the boys' team under the "separate-but-equal" doctrine.[122] In some cases, courts have been called upon to rule on the validity of different game rules for the separate boys' and

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sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport.

45 C.F.R. § 86.41(b) (1987).

[119] *See infra* note 121 and accompanying text.

[120] *See, e.g.*, Bednar v. Nebraska School Activ. Ass'n, 531 F.2d 922, 923 (8th Cir. 1976)(sustaining lower court preliminary injunction which enjoined defendants from excluding female student from cross country competition on basis of sex); Brenden v. Independent School Dist., 477 F.2d 1292, 1302 (8th Cir. 1973)(holding that where high school provided male teams but not female teams in non-contact sports, rule prohibiting female participation in boys' athletic program was violative of fourteenth amendment's equal protection clause); Gilpin v. Kansas State High School Activities Ass'n, 377 F. Supp. 1233, 1242 (D. Kan. 1973)(holding rule which prohibited boys and girls from participating on same athletic team overbroad and thus violative of equal protection as applied to female student prevented from participation on boys' cross country team when no girls' team was provided); *Reed*, 341 F. Supp. at 262-63 (granting preliminary injunction enjoining activities association from preventing female student's participation on boys' golf team).

[121] *Hoover*, 430 F. Supp. at 169.

[122] *See, e.g.*, *Cape*, 563 F.2d at 795 (holding that different rules for girls' basketball do not run afoul of equal protection because girls are given equal opportunity for meaningful participation); O'Conner v. Board of Educ., 545 F. Supp. 376, 379-81 (N.D. Ill. 1982)(holding that refusal by school board to allow female student to try out for boys' basketball team was not violation of girls' equal protection rights where girls' team was provided); *Leffel*, 444 F. Supp. at 1121-22 (holding that equal protection clause of the fourteenth amendment did not require that girls be allowed participation on boys' swimming team where separate girls' team was provided).

girls' teams in the same sport.[123] This issue has been a prevalent factor in cases involving basketball, a sport in which girls have traditionally played a half-court game. Courts ruling on the girls' basketball issue have split on whether there is a constitutional justification for the difference in the game rules.[124] Title IX likewise permits "separate but equal" treatment. Federal regulations specify some of the factors that the government will examine to determine if girls and boys have equal athletic opportunities.[125]

Ironically, the "separate but equal" theory, while repudi-

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[123] *See supra* note 120.

[124] *See, e.g.*, Dodson v. Arkansas Activ. Ass'n, 468 F. Supp. 394, 398 (E.D. Ark. 1979)(holding that different game rules in girls' and boys' high school basketball deprived girls of equal protection in violation of fourteenth amendment; court noted in passing that girls in Mississippi were already playing full-court basketball). *Contra* Cape v. Tennessee Secondary School Athletic Ass'n, 563 F.2d 793, 795 (6th Cir. 1977)(holding that different game rules for girls' basketball were justified by distinct differences in physical characteristics and capabilities between sexes and thus not violative of equal protection); Jones v. Oklahoma Secondary School Activ. Ass'n, 453 F. Supp. 150, 155-56 (W.D. Okla. 1977)(holding that different rules for girls' basketball were not violation of plaintiff's equal protection rights because plaintiff's claimed deprivations did not give rise to equal protection arguments). *See generally*, Ridgeway v. Montana High School Ass'n, 633 F. Supp. 1564, 1582-83 (D. Mont. 1986)(holding that different rules regarding athletic seasons for boys' and girls' teams of same sport not violation of equal protection).

[125] 45 C.F.R. § 84.41(c) (1987). In determining whether equal opportunities are available, the administrators were to consider, among other factors:

> (1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
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> (2) The provision of equipment and supplies;
>
> (3) Scheduling of games and practice time;
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> (4) Travel and per diem allowance;
>
> (5) Opportunity to receive coaching and academic tutoring;
>
> (6) Assignment and compensation of coaches and tutors;
>
> (7) Provision of locker rooms, practice and competitive facilities;
>
> (8) Provision of medical and training facilities and services;
>
> (9) Provision of housing and dining facilities and services;
>
> (10) Publicity
>
> Unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not constitute non-compliance with this section, but the Director may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex.

Id.

ated in race discrimination, remains valid in this context.[126] Of course, the critical question remains what constitutes "equal". The courts have indicated that equal means substantially equal support for male and female teams.[127] Therefore, separate teams will generally not be considered equal unless there is significant equality in items such as funding, travel, coaching, and so forth.[128]

The third context in which sex discrimination in athletics has developed involves contact sports from which girls are generally excluded.[129] Here some courts have barred female participation altogether on the basis of federal regulations. Under Title IX's regulations, contact sports are construed to include boxing, wrestling, rugby, ice hockey, football, and basketball.[130] This list, however, is not exclusive; some jurisdictions have determined that baseball and soccer also are contact sports.[131] While courts have not generally applied the "separate but equal" principle to contact sports which would mandate a girls' team as well as a boy's team, at least one court has applied it to baseball, on the theory that baseball is not a contact sport.[132]

Some courts have also held that a comprehensive exclusion of women from contact sports cannot be justified under the Equal Protection Clause.[133] Thus, while a total exclusion of women from contact sports may be permissible under Title IX, it might, nonetheless, violate the fourteenth amendment. The Ohio case of *Clinton v. Nagy*[134] illustrates this point. In *Clinton*, a twelve-year-old girl claimed that she was denied the opportunity to play interscholastic football solely on the basis of sex.[135] The girl in question was 5'9" tall and weighed in excess of 200

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[126] Brown v. Board of Educ., 347 U.S. 483, 493 (1954).

[127] *Hoover*, 430 F. Supp. at 170 (separate soccer teams might be constitutional if there was substantially equal support for each).

[128] *Id.* at 172.

[129] Hetzel, *supra* note 118, at 289.

[130] 43 C.F.R. § 86.41(b) (1982).

[131] Wong & Ensor, *supra* note 109, at 373.

[132] Carnes v. Tennessee Secondary School Athletic Ass'n, 415 F. Supp. 569, 571-72 (E.D. Tenn. 1976).

[133] *See supra* note 120.

[134] 411 F. Supp. 1396 (N.D. Ohio 1974).

[135] *Id.* at 1397.

pounds.[136] The court stated that she could not be automatically excluded from football based on the argument that as a female she had a lighter bone structure and was more susceptible to injury.[137] The court reasoned that since there were no height and weight requirements for boys, male participants could conceivably be more susceptible to injury than the plaintiff.[138]

In a later case, *Force v. Pierce City R-VI School District*,[139] the court came to the same conclusion reached in *Clinton* by holding that the individual female plaintiff could not be constitutionally barred from trying out for a position on the football team.[140] The court dismissed the defendants' claim that the rule prohibiting female participation in football was justified for safety reasons.[141] In addition, the court refused to accept the defendants' rather frivolous argument that by banning girls from the sport the school district was maximizing the participation of all students in athletics.[142] The court, in conclusion, remarked:

> [t]here is [no] . . . such thing as a constitutional 'right to try.' But the idea that one should be allowed to try—to succeed or to fail as one's abilities and fortunes may dictate, but in the process at least to profit by those things which are learned in the trying—is a concept deeply engrained in our way of thinking; and it should indeed require a 'substantial' justification to deny that privilege to someone simply because she is a female rather than a male.[143]

Commentators have noted that regardless of whether a complaint is made under the fourteenth amendment or under Title IX, courts consider three factors when faced with an alleged athletic discrimination case.[144] The first factor that a court will consider is whether the sport from which girls are excluded is a con-

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[136] Wong & Ensor, *supra* note 109, at 374.
[137] *Clinton*, 411 F. Supp. at 1398.
[138] *Id.* at 1398-99.
[139] 570 F. Supp. 1020 (W.D. Mo. 1983).
[140] *Id.* at 1031-32.
[141] *Force*, 570 F. Supp. at 1028-29.
[142] *Id.* at 1027-29.
[143] *Id.* at 1031.
[144] Wong & Ensor, *supra* note 109, at 353-54.

tact sport.[145] Second, if the exclusion is from a non-contact sport, the court will examine the quality and quantity of opportunities made available to each sex.[146] The third factor considered is the age of the student athletes and the level of competition in question.[147] The younger the athlete and the lower the level of competition, the less likely a court is to hold that there is justifiable physical or physiological reason for barring girls from the activity.[148]

The problem of sexual discrimination in the context of participation in interscholastic athletic teams is not limited to females. While the vast majority of cases involves females who are excluded from playing on all-male teams, it is not unusual to find instances where the complainant is a male who has been excluded from an all-female team. For instance, occasionally a school will have a girls' team in a certain sport, but no boys' team, and boys will be excluded from participating on the girls' team. The courts are more divided on this issue. A distinct minority of courts have solved this discrimination by permitting the boy athlete to play on the girls' team.[149] For example, the Supreme Judicial Court of Massachusetts in *Attorney General v. Massachusetts Interscholastic Athletic Association*[150] rejected the exclusion of boys from a girls' team, by repudiating the argument that the underlying purpose of the exclusion was the safety of the girls.[151] As noted by the court:

> A girl is surely not less exposed to injury as a member of a predominantly male team, than as one of a team predominantly female but with some male players. In any case, a girl is entitled as much as a boy to choose to take a risk, subject always to safety rules and appropriate supervision and

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[145] *Id.* at 354. Any regulation or rule which totally excludes females from all sports or from any non-contact sport is a violation of equal educational opportunity. *Id.*

[146] *Id.*

[147] *Id.*

[148] *Id.*

[149] *See, e.g.*, Gomes v. Rhode Island Interscholastic League, 469 F. Supp. 659, 665-66 (D. R.I. 1979)(upholding boys' sex discrimination claim and allowing him to play on girls' volleyball team), *vacated as moot*, 604 F.2d 733 (1st Cir. 1979).

[150] 378 Mass. 342, 393 N.E.2d 284 (1979).

[151] *Id.* at 293-94.

equipment.[152]

Most courts, however, uphold the exclusion of boys from girls' teams.[153] Although the decisions reflect a variety of reasons for upholding the exclusion, a prevalent reason is that all-girl athletic activities are a way of redressing past discrimination against girls in sports.[154] Another rationale relied on by courts faced with this issue is that athletic opportunities for girls are limited and that if boys are allowed to participate, the death knell for those opportunities will be heard. The United States Court of Appeals for the Ninth Circuit in *Clark v. Arizona Interscholastic Association*[155] explicitly held that the policy of excluding boys from participating on girls' athletic teams was a permissible means of attempting to promote equality of opportunity for girls in interscholastic sports and of redressing past discrimination.[156]

While it appears that discrimination in athletics is still fairly rampant, courts continue to be responsive to the constitutional principles involved. As noted by one court:

> The applicability of so fundamental a constitutional principle as equal educational opportunity should not depend upon anything so mutable as customs, usages, protective equipment and rules of play. The courts do not have competence to determine what games are appropriate for the schools or which, if any, teams should be separated by sex. What the courts can and must do is to insure that those who do make those decisions act with an awareness of what the Constitution does and does

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[152] *Id.* at 294.

[153] *See infra* notes 156.

[154] *See, e.g.*, Clark v. Arizona Interscholastic Ass'n, 695 F.2d 1126, 1131 (9th Cir. 1982)(holding that governmental interest in redressing past discrimination and in promoting equality between sexes was legitimate and sufficient to warrant classification in high school volleyball), *cert. denied*, 464 U.S. 818 (1983); Forte v. Board of Educ., 105 Misc. 2d 36, 431 N.Y.S.2d 321, 324 (N.Y. Sup. Ct. 1980)(holding that regulation prohibiting male membership on girls' volleyball teams was permissible means of redressing disparate treatment of female students in athletics).

[155] 695 F.2d 1126 (9th Cir. 1982).

[156] *Id.* at 1131-32; *see* Petrie v. Illinois High School Ass'n, 75 Ill. App. 3d 980, 394 N.E.2d 855, 862 (Ill. App. Ct. 1979) (holding that regulation restricting volleyball teams to females was substantially related to governmental objective of maintaining and promoting athletic opportunities for females).

not require of them.[157]

III. Conclusion

Important steps have been taken in the last fifteen years towards equal educational opportunities. The development of equal protection theory since 1970 has had far-reaching effects in equalizing the educational opportunities of males and females. Likewise, Title IX's effect has been significant, not in the litigation that it has engendered but in the compliance component of the statute. Unfortunately, sex discrimination still persists in many areas, and much of it has taken on a covert nature.

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[157] *Hoover*, 440 F. Supp. at 171.

AIDS IN THE CLASSROOM

*James A. Keith**

I. Introduction

AIDS[1] in the classroom is an extremely emotional subject that evokes the extremes in human nature - from understanding to total rejection and even to violence.[2] AIDS in the classroom is not an issue affected only by legal reasoning. In fact, there may be no legal reasoning at all.

Ever since AIDS came onto the scene,[3] educators have been extremely concerned about the legal ramifications involved when a student or employee becomes infected with the AIDS virus. Is it permissible to exclude the person from the classroom? If not, what precautions should be taken by the school? Who should be informed of the individual's condition? What is the right of the public to know of the presence of someone with AIDS in the classroom? What is the liability of the school district if a student (or employee) becomes infected by another student or employee? These and other questions haunt school districts throughout the country, and although courts have begun to lay down some guidelines, the issues have not been completely resolved. This article will attempt to examine the key issues facing school districts when presented with AIDS in the classroom and give the reader an understanding of the direction courts are taking when dealing with this sensitive issue. School districts, thus informed regarding court decisions, will know how to respond when confronted with the AIDS problem.

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[1] "AIDS" is the acronym for Acquired Immune Deficiency Syndrome.

[2] *See generally* Monmaney, *Kids with AIDS*, Newsweek, September 7, 1987, at 51, 52-53 (discussion of dilemma of children with AIDS in school).

[3] Although the first cases of AIDS were reported in 1981 to the Public Health Service's Center for Disease Control, the disease may have appeared as early at 1969. Martinez v. School Bd. of Hillsborough County, 692 F.Supp. 1293, 1294 (M.D. Fla. 1988).

II. Medical Overview of AIDS

AIDS, first diagnosed in this country in 1981, is characterized by a severe breakdown in the body's natural immune system caused by a transmittal agent known as the human T-lymphotropic virus type III (HTLV-III).[4] The disease is growing at an exponential rate worldwide and in the United States. Through March 1988, a total of 84,256 cases of AIDS worldwide had been reported.[5] In the United States, 64,506 cases of AIDS were reported to the Center for Disease Control (CDC) through June 6, 1988.[6] Reports indicate that by 1993, approximately 450,000 cases will have been diagnosed.[7] In Mississippi, with a smaller population of high risk groups, 233 AIDS cases had been reported as of December 2, 1988, over half of whom have already died.[8] This number is up from the 121 cases reported one year earlier.[9]

The term "human immunodeficiency virus" (HIV) has now been accepted as the term used when referring to the AIDS virus, replacing HTLV-III. This virus is a human retrovirus that is different from other viruses by virtue of its chromosome structure and its method of replication.[10] A retrovirus enters into the genetic material and reverses the normal flow of genetic messages. When the virus enters the body, it destroys certain white blood cells called T-lymphocytes, which are an integral part of the human immune system.[11] The result is a weakening of the victim's immune system.

An essential part of the diagnosis of clinical AIDS is the victim's affliction with one or more opportunistic diseases which are

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[4] *Id.* at 1294-95.

[5] *Update: Acquired Immunodeficiency Syndrome (AIDS) - Worldwide*, 259 J. A.M.A. 3104, 3104 (June 3, 1988).

[6] Report of the Presidential Commission on the Human Immunodeficiency Virus Epidemic 2 (June 24, 1988).

[7] *450,000 AIDS Cases Projected by 1993*, The Clarion Ledger, June 5, 1988, at 4a, col. 6.

[8] United States and Mississippi AIDS Statistics, Mississippi State Dept. of Health (Dec. 2, 1988).

[9] United States and Mississippi AIDS Statistics, Mississippi State Dept. of Health (Dec. 31, 1988).

[10] *Martinez*, 692 F. Supp. at 1295.

[11] *Id.*

not generally seen in persons with normal immune systems.[12] To understand the disease it is necessary to look at the entire spectrum of its development, since AIDS is the third and final stage of the disease process. The first stage occurs when an individual tests positive to HIV antibodies in the blood, but shows no symptoms of the disease.[13] This person is simply a carrier of the virus. The appearance of antibodies can be detected before the noticeable manifestation of any diseases.[14] It is thought that as many as 1.5 million people in this country may be carriers who have no symptoms of any diseases, but it is not known how many of these carriers will develop clinical AIDS.[15] However, even if an HIV-infected person never contracts one or more opportunistic infections, that individual is a carrier and is capable of transmitting the infection to others.[16] The second stage of the disease is referred to as AIDS-related complex (ARC). ARC is characterized by any two symptoms from a list including, but not limited to swollen lymph nodes, weight loss, nights sweats, diarrhea and two symptoms from a variety of laboratory abnormalities.[17] These individuals show some symptoms of an impaired immune system without infection by one or more opportunistic diseases indicative of clinical AIDS.

Although HIV has been isolated in blood, semen, vaginal fluid, saliva, tears, breast milk and urine, the risk of transmission from each of these secretions varies.[18] Blood, semen, vaginal fluid and breast milk are the only body fluids through which transmission has been documented.[19] Transmission by the other

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[12] *Id.* A variety of definitions have been propounded for AIDS. The CDC defines AIDS as an illness characterized by one or more specific "indicator" diseases in conjunction with certain laboratory evidence of infection. *Revision of CDC Surveillance Case Definition for Acquired Immunodeficiency Syndrome*, 36 MORBIDITY AND MORTALITY WEEKLY REP. 35 (Supp. 1S, August 14, 1987).

[13] *Martinez*, 692 F. Supp. at 1295.

[14] *Id.*

[15] Dept. of Labor, Dept. of Health and Human Services-Joint Advisory Notice: Protection Against Occupational Exposure to Hepatitis B Virus (HBV) and Human Immunodeficiency Virus (HIV), 52 Fed. Reg. 41,818 (Oct. 30, 1987).

[16] Francis & Chin, *The Prevention of Acquired Immunodeficiency Syndrome in the United States*, 257 J. A.M.A. 1357, 1358 (Mar. 13, 1987).

[17] *Martinez*, 692 F. Supp. at 1296.

[18] *See* Francis & Chin, *supra* note 16, at 1358.

[19] *Id.*

body secretions has not been proven to date and remains only a remote theoretical possibility. The only known routes of HIV transmission are sexual intercourse, inoculation with HIV-infected blood, and mother to child in utero, during birth and possibly through breastfeeding.[20]

The general consensus at this time is that the prospects of a cure for AIDS does not appear to be likely in the foreseeable future.[21] Until such time that a viable treatment can be developed, education appears to be the primary weapon against the spread of this disease.

III. Legal Risks to School Districts

School districts find themselves in a very difficult situation in dealing with the issue of AIDS. School districts must balance the deprivation of a student or employee of his right to privacy, and in the case of a student, the right to a free public education, versus the public's right to know of conditions in the school that present health hazards.[22] States have statutes allowing school districts to prohibit individuals who have contagious diseases from attending school.[23] However, the Mississippi legislature has not passed legislation specifically addressing AIDS and its impact on schools.[24] Furthermore, Congress has not passed any leg-

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[20] *Id.*

[21] *Martinez*, 692 F. Supp. at 1296.

[22] *See, e.g.*, Roe v. Wade, 410 U.S. 113, 153 (1973) (right to make decisions regarding abortions); Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (right to make personal decisions concerning use of contraceptives). Although there is no fundamental right to a free public education, the United States Supreme Court has made it abundantly clear that exclusion of children from schools will not be tolerated. *See* Plyler v. Doe, 457 U.S. 202, 202 (1982) (state statute withholding funds from school districts educating illegal aliens violated fourteenth amendment); Brown v. Board of Educ., 347 U.S. 483, 493 (1954) (educational opportunities provided by state must be made available to all on equal terms). The Mississippi Supreme Court recognizes a fundamental right to a minimally adequate public education. Clinton Mun. Separate School Dist. v. Byrd, 477 So. 2d 237, 240 (Miss. 1985).

[23] *See, e.g.* Miss. Code Ann. § 37-7-301(h) (Supp. 1988) (excludes from school students with infectious or contagious diseases unless such student presents health certificate that he is free from such disease); *see also* Jacobson v. Massachusetts, 197 U.S. 11, 38 (1905) (state compulsory immunization statute upheld as valid exercise of state police power).

[24] The Mississippi legislature during the 1988 legislative session passed a statute requiring the reporting of cases of communicable diseases. Miss. Code Ann. § 41-23-1

islation specifically addressing the problem of AIDS in this country.[25]

A. Section 504 of the Rehabilitation Act of 1973.

Although not enacted with AIDS in mind, section 504 of the Rehabilitation Act of 1973 has evolved as the primary source of protection for students and employees of school districts.[26] Section 504 is broad, anti-discrimination legislation prohibiting discrimination against handicapped individuals. It is not limited to students and employees of public school districts, as it applies to the public in general with certain restrictions. Section 504 provides in part as follows:

> No otherwise qualified individual with handicaps in the United States, as defined in Section 706(8) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . .[27]

In order to take advantage of section 504, one must show: (1) that he seeks to participate in a program or activity that receives federal financial assistance, (2) that he is handicapped and has been excluded from participating based on that handicap, and (3) that he is "otherwise qualified."[28] Each of these elements requires further examination to determine how section 504 affects schools with respect to the AIDS issue.

By receiving federal funds, public schools clearly meet the first element by qualifying as a program or activity that receives federal financial assistance. The only question prior to this year was whether the entire operation of the school came under the umbrella of section 504 or only the specific program receiving

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(Supp. 1988).

[25] In September, 1988, the House of Representatives passed an AIDS policy bill that calls for, *inter alia*, testing, counseling, confidentiality of test results and expanded research. AIDS Federal Policy Act, H. 3071, 100th Cong., 1st Sess. (1988).

[26] 29 U.S.C.A. § 794 (West Supp. 1988). This law was passed approximately eight years before AIDS was first diagnosed in the United States. *See supra* note 3.

[27] 29 U.S.C.A. § 794 (West Supp. 1988).

[28] *Id.*

federal funds.[29] Congress laid that issue to rest by enacting the Civil Rights Restoration Act of 1987.[30] The Act amended section 504 to include the entire operation of a state or local government, college, university, school, or business if federal financial assistance is extended to any part.[31]

To meet the second element, a person must be handicapped under section 504 in accordance with the following definition:

> [A]ny person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.[32]

This definition was expanded from that originally promulgated to include those individuals who may not presently have an actual incapacity, but who have a past record of impairment or who are regarded as having an impairment.[33]

To determine who is handicapped under section 504, it is necessary to look at the regulations promulgated by the Department of Health and Human Services which define certain key terms. One of those terms, "physical impairment," is defined in part as follows:

> [A]ny physiological disorder or condition, cosmetic disfigurement or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular, reproductive, digestive; genito-urinary; hemic and lymphatic; skin; and endocrine.[34]

Another key term, "major life activities," is defined as "func-

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[29] *See* Grove City College v. Bell, 465 U.S. 555, 573 (1984) (education program or activity receiving federal financial assistance was limited to college's financial aid program and did not include entire college).

[30] Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988).

[31] *Id.*

[32] 29 U.S.C.A. § 706(8)(B) (West Supp. 1988).

[33] *See* Southeastern Community College v. Davis, 442 U.S. 397, 405-06 n.6 (1979) (educational institution can require reasonable physical qualifications for admission to clinical training program and thus could refuse to admit individual with hearing disability).

[34] 45 C.F.R. § 84.3(j)(2)(i)(1987).

tions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."[35]

The final requirement for an individual to come under the protection of section 504 is a determination that he is "otherwise qualified."[36] An analysis of this question is necessary if section 504 is to achieve its objective of protecting handicapped individuals from discriminatory actions while providing the public with assurance that it will not be exposed to significant health and safety risks.

A person is "otherwise qualified" if he can meet all of a program's requirements in spite of his handicap.[37] Thus, an individual who poses a significant risk of transmitting an infectious disease to others in the classroom will not be otherwise qualified to remain in the classroom unless reasonable accommodation will eliminate the risk.[38]

In deciding whether a person is "otherwise qualified," the first step is to inquire about: "(1) the nature of the risk (how the disease is transmitted), (2) the duration of the risk (how long is the carrier infectious), (3) the severity of the risk (what is the potential harm to third parties), and (4) the probabilities the disease will be transmitted and will cause varying degrees of harm."[39] One should defer to the reasonable medical judgments of public health officials in making these findings.[40] The next step is to determine in light of the foregoing whether a school could reasonably accommodate a person with an infectious disease. Accommodation is not reasonable if it imposes "undue financial and administrative burdens" on a school or requires "a

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[35] *Id.* § 84.3(j)(2)(ii)(1987).

[36] *Southeastern Community College*, 442 U.S. at 406.

[37] *Id.*

[38] Doe v. Dolton Elementary School Dist. No. 148, 694 F.Supp. 440, 445 (N.D. Ill. 1988). A pre-teen student with AIDS was granted an injunction allowing him to attend school as long as he complied with certain requirements laid down by the court. *Id.* The court prohibited him from engaging in contact sports, required him to have monthly medical examinations performed by his doctor and weekly examinations performed by the school nurse and required his parents to report immediately to the school district any open lesions or illness. *Id.*

[39] School Bd. of Nassau County v. Arline, 480 U.S. 273, 288 (1987).

[40] *Id.*

fundamental alteration in the nature of the program."[41] Discrimination will not be found where reasonable accommodation does not overcome the effects of a person's handicap or where reasonable accommodation causes undue hardship to the school.[42]

B. Application of Section 504 by Courts

In view of the foregoing analysis, how has section 504 become the primary law involving the issue of AIDS? Ironically, *School Board of Nassau County v. Arline*,[43] the most important case bearing on this question, is not an AIDS case, but a tuberculosis case. Arline, an elementary school teacher, was discharged after several reoccurrences of tuberculosis. She brought suit alleging she was handicapped under section 504 and that she was otherwise qualified since the risk of infection to her students was minimal. The United States Supreme Court held that Arline was handicapped under section 504 because her hospitalization established a record of impairment and her impairment had substantially limited her major life activities.[44] Due to a lack of factual findings by the district court, the case was remanded to determine whether Arline was otherwise qualified for her job. Based on extensive medical testimony, the district court, upon remand, concluded that Arline posed no risk to the students as she was cured of tuberculosis and, therefore, was entitled to re-

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[41] *Southeastern Community College*, 442 U.S. at 410. Factors to be considered in determining whether accommodation would cause undue hardship include:

(1) The overall size of the recipient's program with respect to number of employees, number and type of facilities, and size of budget;

(2) The type of recipient's operation, including the composition and structure of the recipient's workforce; and

(3) The nature and cost of the accommodation needed.

45 C.F.R. 84.12(c)(1985).

[42] *Southeastern Community College*, 442 U.S. at 410-13; *see* Alexander v. Choate, 469 U.S. 287, 289 (1985) (effect on handicapped of state's reduction in annual inpatient coverage held not cognizable under § 504); Strathie v. Department of Transp., 716 F.2d 227, 231 (3d Cir. 1983) (reasons advanced by state in support of hearing requirements for obtaining driver's license not violative of Rehabilitation Act); 45 C.F.R. pt. 84, App.A, p. 350 (1985) (recipient of federal financial assistance required to make reasonable accommodation to physical or mental limitations of handicapped individual unless demonstration made of undue hardship).

[43] *Arline*, 480 U.S. at 289.

[44] *Id.* at 281.

instatement to her position as teacher.[45]

Although *Arline* did not involve AIDS, it clearly held that "[a]llowing discrimination based on the contagious effects of a physical impairment would be inconsistent with the basic purpose of section 504. . . ."[46] Thus, persons with AIDS, those in whom the disease has progressed to a point where opportunistic diseases have developed and have substantially impaired one or more major life activities, meet the definition of handicapped under section 504. Likewise, those individuals with ARC, who have disabling physical effects caused by the HIV infection, qualify as handicapped under section 504. Assuming theses individuals are otherwise qualified, contagiousness does not justify discrimination based on their handicap with AIDS or ARC.

The *Arline* court did not hold that a person with an active, contagious disease would be allowed in the classroom.[47] In fact, the court's decision is clear that a person who poses a significant risk of transmitting an infectious disease in the classroom will not be otherwise qualified if reasonable accommodation is not possible.[48]

What has been the result when courts have specifically addressed cases involving AIDS? A pre-*Arline* case held that a kindergarten student infected with AIDS was handicapped under section 504 because of significant impairment of his major life activities.[49] The court examined voluminous medical and scientific evidence and determined that the student posed no risk of harm to his fellow students and teachers and thus was otherwise qualified to attend class.[50]

Another important case involved three hemophiliac brothers who tested HIV-positive but did not have clinical AIDS.[51] No

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[45] Arline v. School Bd. of Nassau County, 692 F.Supp. 1286, 1293 (M.D. Fla. 1988).

[46] *Arline*, 480 U.S. at 284. Although it is clear under *Arline* that an individual with AIDS or ARC would be protected by § 504, it is not clear whether *Arline* would afford the same protection to an asymptomatic carrier of the AIDS virus. The court in *Arline* specifically refused to consider whether a carrier of the AIDS virus was physically impaired or handicapped under § 504. *Id.* at 282 n. 7.

[47] *Id.* at 287 n.16.

[48] *Id.*

[49] Thomas v. Atascadero Unified School Dist., 662 F.Supp. 376, 381 (C.D. Cal. 1987).

[50] *Id.* at 382.

[51] Ray v. School Dist. of DeSoto County, 666 F.Supp. 1524, 1528 (M.D. Fla. 1987).

opportunistic diseases had afflicted the three brothers. When the school district would not allow the boys to be admitted to school, they sued asking for a preliminary injunction to be allowed to attend school. The court, relying on medical science as it presently existed, and without yielding to community fear and parental pressure, granted the injunction, basing its decision in part on the belief that the brothers in all likelihood would prevail on the merits of the case.[52] While allowing the brothers to attend school, the court emphasized the responsibility of the brothers to protect themselves and the school population from the risk of exposure to HIV infection.[53]

In a case involving a teacher with AIDS, the school district attempted to skirt the problem by reassigning the teacher to an administrative position at the same rate of pay and benefits.[54] The teacher refused the offer and asked for injunctive relief to be placed back in his teaching position. Relying on extensive medical evidence and earlier court decisions, the court of appeals found that there was no significant danger to other persons in the school environment and that the teacher would in all probability succeed on the merits.[55] Further, the court reasoned that the teacher, although not monetarily injured, would be irreparably injured if removed from his job of teaching hearing-impaired children in a classroom setting.[56] Recognizing the pub-

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[52] *Id.* at 1536.

[53] *Id.* at 1537. The Ray brothers were required to cover all sores and lesions while in school, maintain a high standard of hygiene, avoid contact sports and avoid all incidents at school that might result in the spill of blood or other body fluids. *Id.* Unfortunately, the court's ruling did not stop the fear, apprehension and paranoia created in the community where the Ray brothers lived. *See* Monmaney, *supra* note 2, at 52. Approximately half of the student body boycotted classes, citizens rallied, bomb threats were made against the school and a suspicious fire destroyed the Ray home. *Id.* The Rays were forced to move to another community. *Id.* The Rays filed a civil action against the school district for barring them from the classroom. In a widely publicized settlement, the district agreed to pay a $1.1 million award to the Ray brothers and their parents. *Judge: $1.1 Million Settlement in AIDS Case Should Teach Schools Lesson* (LEXIS, News Library, AP file)(Sept. 30, 1988). An interesting postscript to this case is that when the Rays moved, they relocated about fifty miles from their original home where they continue to live and attend school without incident. *Id.*

[54] Chalk v. United States Dist. Court Cent. Dist. of Cal., 840 F.2d 701, 703 (9th Cir. 1988).

[55] *Id.* at 708-09.

[56] *Id.* at 709-10.

lic interest in this case, the court nonetheless refused to base its decision on the fear and apprehension of others.[57] The court did not stop at that point. It charged the district court with establishing reasonable procedures to monitor the teacher's condition to insure that no significant risk of harm would arise in the future as long as the teacher remained in the classroom.[58]

Do the foregoing cases mean that a court will never prevent a child with AIDS from obtaining his education in the classroom? Apparently not, because a United States District Court recently refused to grant an injunction admitting a six-year old trainable mentally handicapped student diagnosed with ARC to a special education class.[59] Because the student was incontinent and kept her finger and thumb in her mouth, and because of clearly divided expert medical evidence, the court found that the plaintiff did not carry its burden of establishing its likelihood of prevailing on the merits.[60]

By the time *Martinez* was heard on the merits, the student had developed AIDS.[61] Concentrating on the nature of the risk and the probabilities of transmission, the trial court found that since the student was incontinent and sucked her thumb and forefinger continuously, totally unrestricted placement in a trainable mentally handicapped (TMH) class was inappropriate.[62] Neither could the court find that placement in a homebound program was appropriate.[63] Instead, it held that the student should be placed in the TMH class, but only under certain conditions, limitations and restrictions. Those requirements included the construction of a separate room inside the classroom, with a sound system, large picture window and a full-time aide to remain in the room with the student. The student was required to attend school in this room as long as her condition

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[57] *Id.* at 711.

[58] *Id.*

[59] Martinez v. School Bd. of Hillsborough County, 675 F.Supp. 1574, 1585 (M.D. Fla. 1987).

[60] *Id.*

[61] *Martinez*, 692 F.Supp. at 1300.

[62] *Id.* at 1304.

[63] *Id.*

remained unchanged.[64]

Obviously not satisfied with the district court's ruling, Martinez appealed to the Eleventh Circuit Court of Appeals.[65] The appellate court ruled that the trial court's conclusions concerning risks of transmission (that only a remote theoretical possibility of transmission existed through tears, saliva and urine) were insufficient to exclude Martinez from her classroom.[66] Since the trial court failed to make findings with respect to the overall risk of transmission from all bodily fluids, the case was remanded.[67] According to the court of appeals, such findings were necessary to determine whether Martinez was otherwise qualified.[68] Since Martinez was handicapped under the Education of All Handicapped Children Act,[69] in addition to section 504, the trial court was further directed to hear evidence concerning the effect any reasonable accommodation might have on her psychological and educational development.[70]

In light of the foregoing cases, it appears that absent unique circumstances, individuals with AIDS or ARC will be allowed to be present in the classroom. *Martinez* indicates that the circumstances will indeed have to be very unique.[71] But what about individuals who are asymptomatic carriers of HIV and have no outward appearance of the disease, an issue that was sidestepped by the Supreme Court in *Arline*? Does an asymptomatic carrier meet the definition of handicapped under section 504, a

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[64] *Id.* at 1305-06.

[65] Martinez v. School Bd. of Hillsborough County, 861 F.2d 1502 (11th Cir. 1988).

[66] *Id.* at 1506.

[67] *Id.*

[68] *Id.*

[69] 20 U.S.C. §§ 1400-1485 (1986). The Education of All Handicapped Children Act (EHA) defines handicapped children as children who are "mentally retarded, hard of hearing, deaf, speech or language impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, or other health impaired children, or children with specific learning disabilities, who by reason thereof require special education and related service." *Id.* § 1401(a).

[70] *Martinez*, 861 F.2d at 1506.

[71] *Id.* at 1503. Eliana Martinez is a seven year old trainable mentally handicapped child with an I.Q. of 41. *Id.* She is in the late stages of AIDS, is not toilet trained, suffers from thrush, sucks her thumb and forefinger and in the past has had skin lesions. *Id.* In spite of the CDC's recommendation that such children should probably remain outside the classroom, the appellate and district courts still struggle with whether Martinez is otherwise qualified to attend school. *Id.*

question requiring an analysis of whether such an individual (1) has a physical impairment that limits one or more of his major life activities, (2) has a record of impairment, or (3) is regarded as being impaired?[72]

Unfortunately, there is a dearth of cases that have specifically addressed this issue. The *Ray* court, although dealing with asymptomatic carriers of the AIDS virus, granted the Rays' request for injunctive relief because of the absence of legal precedence supporting exclusion from the classroom and without addressing the issue of whether asymptomatic carriers are handicapped under section 504.[73] However, another post-*Arline* court used *Arline*'s analysis and held that an HIV-infected individual was handicapped since he was perceived to be by others.[74]

The most significant development concerning whether asymptomatic HIV carriers are protected by section 504 was the recent position taken by the United States Department of Justice that such carriers are protected the same as those diagnosed with AIDS or ARC.[75] This conclusion was reached by examining the three-part question required by section 504. First, by relying on the views of the Public Health Service of the United States, the Department found that a person with HIV infection is clearly impaired.[76] The question concerning limits on major life activities was more difficult to answer because in many instances asymptomatic HIV infected individuals appear to have no disa-

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[72] 29 U.S.C.A. § 706 (7)(B)(West Supp. 1988).

[73] *Ray*, 666 F.Supp. at 1534-38.

[74] Doe v. Centinela Hospital, Civ. 87-2514, 57 U.S.L.W. 2034 (C.D. Cal. June 30, 1988) 1988 WL 81776 (Westlaw, Allfeds library).

[75] Gen. Couns. Mem. 88-398 (Oct. 6, 1988), Opinion by Douglas W. Kmiec, Acting Assistant Attorney General, Office of Legal Counsel, U.S. Dept. of Justice. This opinion differs from the position taken by the Department of Justice in an opinion dated June 20, 1986, written by Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel in answer to a request by the General Counsel for the Department of Health and Human Services. *Id.* at 2 n.4. In the 1986 opinion, the Justice memorandum held that an individual was not handicapped under § 504 solely because he was a carrier of the AIDS virus. The Department's opinion was that an employer did not discriminate if the employer took action against an employee based on the fear of an individual's contagiousness. The Department apparently changed its position after subsequent legal developments, such as the *Arline* decision, passage of the Civil Rights Restoration Act and subsequent medical developments. *Id.* at 3 n.4.

[76] *Id.* at 8-9.

bling physical effects from this infection.[77] However, the Department recognized that activities such as procreation and intimate personal relations would be substantially limited.[78] Even if a factual question existed concerning whether there was a physical impairment, the Department pointed out that an alternative rationale for finding a limitation on major life activities might be based on the reaction of others to the infection.[79] Relying on *Arline, Southeastern Community College* and *Doe v. Centinela Hospital*, the Department determined that an HIV-infected individual is handicapped under section 504 because he will be perceived as handicapped by others.[80]

C. Protection under Education for All Handicapped Children Act

Does the Education of All Handicapped Children Act (EHA)[81] provide protection to a student who has AIDS, ARC or is HIV-infected?[82] That question was recently answered by a district court which concluded that EHA would apply to a student who is diagnosed with any of the categories of AIDS only if the student's physical condition adversely affected his educational performance.[83] Under EHA's definition of a handicap, an HIV-infected student would have to come under the category of "other health impaired."[84] But simply being categorized as "other health impaired" is not sufficient since the impairment, infection with HIV, must also affect the student's ability to learn and perform in the classroom.[85] Thus, simply because a student has AIDS, ARC or is HIV-infected will not bring him under the umbrella of EHA. However, since AIDS is a progressive disease, an HIV-infected student may change from unpro-

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[77] *Id.* at 9.

[78] *Id.* at 10-11.

[79] *Id.* at 11-12.

[80] *Id.* at 12-15.

[81] Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (codified as amended at 20 U.S.C. §§ 1400-1461 (1982)).

[82] *Id. See supra* note 69 (definition of handicapped children under EHA).

[83] Doe v. Belleville Public School Dist. No. 118, 672 F.Supp. 342, 345 (S.D. Ill. 1987).

[84] *Id.*

[85] *Id.*

tected status under EHA to being protected by that Act. In that event, the substantial procedural requirements under EHA will give the HIV-infected student even greater protection from being excluded from the classroom.

IV. Other Major Issues Facing School Districts

A. *Confidentiality*

Although exclusion from the classroom is the most controversial issue facing school districts, no less important is the concern with confidentiality. The Family Educational Rights and Privacy Act of 1974 (FERPA) requires recipients of federal funding to maintain confidentiality of education records.[86] The medical records of a student clearly would be protected by this statute and cannot be disclosed without the consent of the parents. Thus, a student's HIV status cannot be revealed without consent. Furthermore, the statutory protection for handicapped children would prevent disclosure of a handicapped student's condition relative to AIDS.[87]

Does this mean that no one in the school district should be told of an individual's infection with HIV? To the contrary, it is very important that someone in the school district be aware of who is infected with HIV, not only to protect uninfected persons, but to protect the infected individual from exposure to other infectious diseases such as measles and chicken pox.[88] Because of a compromised immune system, such diseases could be fatal to the HIV-infected person.

The Centers for Disease Control (CDC) have issued a number of guidelines dealing with the prevention of the spread of

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[86] Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232(g) (1982) (also called Buckley Amendment).

[87] 29 U.S.C. § 794 (Supp. 1986); 20 U.S.C. § 1412 (2) (D) (1982); 20 U.S.C. § 1417(c) (1982).

[88] Regulations to FERPA provide for the following three exceptions to the prohibition against disclosure that may apply: (1) treatment records of students eighteen years of age or older are not included in the definition of education records; (2) records may be disclosed to the appropriate parties in connection with an emergency if the information is necessary for the protection of the health or safety of others; (3) records may be disclosed to appropriate school officials who have legitimate educational interests. 34 C.F.R. §§ 99.3(b)(4)(iii), 99.31(a)(1), 99.36(a)(1987).

AIDS in the classroom environment.[89] Recognizing the need for confidentiality and the right to privacy for those infected with HIV, the CDC recommends that decisions involving the educational placement of HIV-infected students should be made using the team approach, which would include school personnel directly associated with the proposed educational setting.[90] This presumably would mean the school teacher, school nurse and possibly school principal.

Endorsing the CDC's guidelines, the Mississippi State Board of Education on June 24, 1988 adopted guidelines for dealing with HIV infection in the educational setting.[91] The guidelines, patterned after those adopted by the CDC, recommend the team approach concerning the appropriateness of school attendance or employment of HIV-infected persons, including school officials on the team. The guidelines further recommend that the number of persons who are made aware of the individual student's or employee's condition be limited only to those who are required to insure proper care of the infected person and who are needed to detect and control situations where risk of transmission might exist.[92] The model policy adopted by the Board recommends that the local school district should take extreme care not to disclose any information that would lead to the identification of the HIV-infected person.[93]

Although it is clear that a school district cannot reveal publicly the identification of the HIV-infected person present in the classroom, the question remains whether a school district can announce the fact that an individual in the district is HIV-infected without giving specific information.[94] Presumably, school

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[89] *Education and Foster Care of Children Infected with Human T.-Lymphotropic Virus Type III/Lymphadenopathy-Associated Virus*, 34 MORBIDITY AND MORTALITY WEEKLY REP. 519-20 (Aug. 30, 1985).

[90] *Id.*

[91] *Guidelines for Dealing With HIV Infection and Model Communicable Disease Control Policy With Considerations When Developing a District Communicable Disease Control Policy*, Mississippi Department of Education, June 17, 1988.

[92] *Id.* at H1.

[93] *Id.* at C2.

[94] *See Education Daily*, 2 (July 25, 1988)(parents of child with AIDS filed suit against school system over policy of notifying all parents when child who is HIV-infected enrolls in school).

districts might desire to take this action under pressure from parents who want to be able to decide whether their child goes to school with an HIV-infected person. Of course, to announce that an individual in the district is HIV-infected would only lead to additional pressure from parents who want to know more detailed information, such as the particular school and specific class the student attends. Since any information provided by the district may lead to the identification of the individual, a lawsuit will most assuredly result, with the school district trying to prove that its information did not lead to the identification of the HIV-infected person.

School boards should be extremely careful because of the risk of a privacy right violation where the medical condition of an employee is revealed to a third party. This issue was raised in a case involving a school teacher whose medical insurance form identifying him with having AIDS was negligently sent to his employer, causing him to lose his job temporarily.[95] The tort of invasion of privacy resulting from disclosure of a true fact requires a showing that the fact was private, that it was sensitive personal information, not ordinarily disclosed, that it would be highly offensive to the persons learning the disclosed information, and that disclosure was not of legitimate concern to the public.[96] An employer who releases information that an employee has AIDS is risking a suit alleging invasion of privacy.[97]

B. Testing

A question frequently asked by school districts is whether a district can require an employee or student to be tested where it suspects the individual is HIV-infected. Although regulations under section 504 do not prohibit per se pre-employment blood testing for AIDS, an employer is not allowed to conduct a pre-employment medical examination or make pre-employment in-

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[95] Hartog-Rapp, *AIDS Poses Legal Risks for School Boards*, 40 EDUC. LAW REP. 1121, 1132 (1987).

[96] RESTATEMENT (SECOND) OF TORTS § 652D (1976).

[97] *See* Burris v. South Central Bell Tel. Co., 540 F.Supp. 905, 910 (S.D. Miss. 1982) (cause of action for invasion of privacy based on unreasonable intrusion into one's private affairs requires pattern of harassment or communication of vicious nature).

quiry of whether a job applicant is handicapped or inquire about the nature or severity of a handicap.[98] An employer may require pre-employment tests that are job-related.[99] Thus, an employer could require pre-employment tests for HIV if it can be shown the test is job-related. An employer may condition an offer of employment on the results of a medical examination conducted before the employee begins his job, provided the examination is routinely given to all new employees and the results are used in accordance with section 504.[100] Thus, a teacher who tests positive for HIV could not be refused employment if he is otherwise qualified to perform the job.[101] Although regulations to section 504 address only pre-employment examinations, it is safe to assume the same standards apply to medical examinations that are required during the course of employment.

In addition to section 504 constraints, there are serious legal problems with HIV testing of public employees under the fourth amendment. Unreasonable searches and seizures are prohibited by the fourth amendment where there is an infringement of "an expectation of privacy that society is prepared to consider reasonable."[102] Courts have determined that a compulsory blood test in the public sector constitutes a search and seizure.[103] The standard for determining whether the search is justified calls for a court to look at the "nature and quality of the intrusion on the individual's fourth amendment interests against the importance of the governmental interest alleged to justify the intrusion."[104]

Applying the *O'Connor* standard, the Nebraska Supreme Court, in *Glover v. Eastern Nebraska Community Office of Retardation*,[105] found that such tests constituted an illegal search and seizure. In *Glover*, the Eastern Nebraska Human Services

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[98] 45 C.F.R. § 84.14(a) (1987).

[99] *Id.*

[100] *Id.* § 84.14(c).

[101] *See supra* notes 36-42 and accompanying text.

[102] O'Connor v. Ortega, 480 U.S. 709, 715 (1987)(quoting United States v. Jacobsen, 466 U.S. 109, 113 (1984)).

[103] Schmerber v. California, 384 U.S. 757, 767 (1966).

[104] *O'Connor*, 480 U.S. at 719, (quoting United States v. Place, 462 U.S. 696, 703 (1983)).

[105] Glover v. Eastern Neb. Community Office of Retardation, 686 F. Supp. 243 (D. Neb. 1988).

Agency adopted an infectious disease policy requiring certain employees to be tested at least annually for tuberculosis, hepatitis and HIV.[106] These employees worked for a division of the Agency providing residential, vocational and specialized services for the mentally retarded.[107] Persons served by the organization ranged from mild to the profound level of retardation and sometimes exhibited violent behavior.[108] The policy was enacted after an employee, who had been bitten, scratched, pinched, kicked and hit by patients, died from AIDS.[109] Relying on medical testimony that the risk of transmission from an HIV-infected employee to a patient was so minuscule that it was almost zero, the *Glover* court found that the policy was not required to protect patents from medical risks and, therefore, constituted an illegal search and seizure in violation of the fourth amendment.[110] The policy was simply too broad to justify its infringement on the employees' right to privacy.[111]

Although HIV testing has been upheld in very specific situations,[112] the risk of contagion in the classroom is so minimal that testing of students and school personnel will be found violative of the individual's constitutional protection.[113]

Another problem facing a school district in the area of blood testing could be the possible liability for failure to inform an employee who tests HIV-positive. An employee may be entitled to rely on the expectation that his employer will inform him of

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[106] *Id* at 245.

[107] *Id.*

[108] *Id.*

[109] *Id.* at 247.

[110] *Id.* at 251.

[111] *Id.*

[112] Local 1812, Am. Fed. of Gov't Employees v. United States Dept. of State, 662 F.Supp. 50 (D.D.C. 1987). In *Local 1812*, the court allowed the Department of State to expand its medical fitness program for all foreign service workers to include HIV testing. *Id.* at 54. Focusing on the employee's fitness for duty in a specialized government agency, the court found that the HIV test was rational and closely related to fitness for duty. *Id.* at 53. The court gave weight to the fact that the employees would be placed in foreign posts where medical facilities were inadequate to diagnose and treat problems that might arise in an HIV-infected person. *Id.* at 54. Recognizing that an HIV-infected employee is covered by § 504, the court nonetheless held that such individuals were not otherwise qualified for foreign service duty. *Id.*

[113] *Glover*, 686 F.Supp. at 250-51.

any dangerous condition discovered by the test.[114] In addition, and a more difficult question, is whether a duty exists for an employer to disclose to the spouse of an employee that the employee has tested positive for HIV. A spouse might claim that the employer, armed with knowledge of a dangerous condition, had a duty to inform her because of the likelihood she would contact HIV by engaging in sexual relations with her husband.[115] This issue has not been fully addressed by the courts, but it has the potential for tremendous liability for employers who insist on testing its employees. In view of the fact that an employer such as a school district cannot deny employment based on positive HIV tests alone, testing appears to be of no value to the district. On the other hand, information learned from testing may place a higher duty on the district and expose it to a myriad of legal problems.

C. Labor Issues

Can employees of a school district refuse to teach an HIV-infected student or work with HIV-infected personnel? The National Labor Relations Act provides employees with the right to engage in concerted activities for their mutual aid or protection.[116] Concerted activity by an employee must be with or on behalf of other employees and not by himself or on his own behalf.[117] In order for an employee to protest against a perceived dangerous condition in the work place, such as another employee's HIV-infected condition, the employee must have a good faith reasonable belief that a dangerous condition exists.[118] Thus, if employees have a good faith reasonable belief that they risk infection by working with an HIV-infected person, their re-

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[114] *See* Union Carbide and Carbon Corp. v. Stapleton, 237 F.2d 229, 232 (6th Cir. 1956) (employer who required periodic medical examinations of employees had duty to disclose to employee that he was suffering from tuberculosis).

[115] *See, e.g.*, Tarasoff v. Regents of Univ. of Cal., 17 Cal. 3d 25, 551 P.2d 334, 343-44, 131 Cal. Rptr. 14, 23-24 (1976)(psychotherapist who determined that patient presented serious danger of violence to another incurred obligation to use reasonable care to protect victim).

[116] National Labor Relations Act, 29 U.S.C. § 157 (1982).

[117] *Id.*

[118] *See* Johnson-Stewart-Johnson Mining Co., Inc. v. Martorana, 263 NLRB Dec. (CCH) ¶ 15,089 (1982).

fusal to work with such an individual may be protected activity. However, an employer, by educating its employees about AIDS and its methods of transmission, could show that the employee's fears were unreasonable and thus not protected.[119]

V. Conclusion

As this article points out, there is a maze of legal issues surrounding student and employee rights with regard to AIDS in the classroom. Other legal theories are being identified to protect those infected with HIV. With the tremendous increase in AIDS cases, the problems associated with AIDS in the classroom will not go away but will continue to grow. Schools must take an aggressive role in educating the public, parents and students with respect to AIDS and the risk of transmission in the school environment. Only when the public has such an understanding will school boards be able to protect the rights of infected individuals and adopt policies enabling the board to address each situation without the fear and paranoia so often prevalent in each case.

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[119] Gateway Coal Co. v. United Mine Workers of America, 414 U.S. 368 (1974).

RECENT DECISIONS

Constitutional Law — Procedural Due Process — Where School Board Has Considered Only Listed Charges in Expulsion Proceedings, the Board's Failure to Inform Student of Additional Allegations or to Give Student the Opportunity to Confront Accusers Will Not Constitute Denial of Procedural Due Process

Plaintiffs[1] filed a complaint in chancery court[2] against defendant school Board of Trustees[3] appealing the plaintiffs' expulsion from school and seeking reinstatement.[4] The defendant had expelled[5] the plaintiff following an evidentiary hearing.[6] Since students making alle-

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[1] Plaintiffs were Regina Jones, the student, and her parents, Mr. and Mrs. Marvin L. Jones. Jones v. Pascagoula Mun. Sep. School Dist., 524 So. 2d 968 (Miss. 1988).

[2] *Id.* at 970. Plaintiffs filed the complaint in the Chancery Court of Jackson County. *Id.* Subsequently, plaintiffs filed a motion to strike from the record of the Board of Trustees' hearing the transcripts of disciplinary hearings of nine other students. *Id.*

[3] *Id.* at 969. Plaintiff attended William M. Colmer Junior High School in the Pascagoula Municipal Separate School District. *Id.*

[4] *Id.* The suspension process began on January 20, 1986, when the Board's Disciplinary Review Committee held a hearing regarding alleged drug involvement on campus. *Id.* At this hearing, an assistant principal at William M. Colmer Junior High School stated that nine of ten students he had spoken with said Regina Jones was distributing drugs. *Id.* The committee recommended expulsion of the plaintiff for the remainder of the 1985-86 school year. *Id.* Plaintiffs appealed this decision to the school superintendent who reviewed the record and recommended to the Board of Trustees that it expel the plaintiff. *Id.*

[5] *Id.* at 970. Under the Mississippi Code, a school board of trustees has authority "to suspend or expel a pupil for misconduct in the school, upon school buses, on the road to and from school, during recess or upon the school playgrounds. . . ." Miss. Code Ann. § 37-7-301(e) (1972).

[6] *Jones*, 524 So. 2d at 969. Counsel represented plaintiffs at the Board hearing. *Id.* Two students, Brandon Winstead and Sean Dixon, testified that the plaintiff had given Winstead ten valium tablets at her house after school. *Id.* Another student, Brandon

gations additional to those of which the plaintiff had formal notice[7] did not appear at this hearing,[8] plaintiffs alleged that the Board's failure to inform them of the additional allegations or give them an opportunity to confront the students making those allegations constituted a denial of procedural due process.[9] Plaintiffs also maintained that the defendant had insufficient evidence to support the expulsion.[10] The defendant, arguing that plaintiffs indeed had notice of the non-listed charges,[11] maintained that it had not considered the students' additional allegations.[12] The trial court affirmed the expulsion.[13] On appeal, the Mississippi Supreme Court, *held*, affirmed.[14] Where it is not clear

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Erwin, testified that he received a valium tablet from the plaintiff in a school hallway. *Id.* Erwin's sister, Tasha, told the Board the plaintiff had given "Brandon" a pill. *Id.* Although the record was vague, it appeared Tasha meant Brandon Winstead and not her brother, Brandon Erwin. *Id.* Plaintiff denied any involvement in distributing drugs. *Id.* at 970. She suggested that some of her accusers had reasons for wanting to get her into trouble. *Id.* In fact, three of the students did not accuse the plaintiff of drug distribution until after the plaintiff had turned them in for drug possession. *Id.* According to the plaintiff's mother, these students repeatedly telephoned the plaintiff and threatened to "get [her] for turning [them] in." *Id.*

[7] *Id.* at 972. Prior to the Board hearing, the Board gave plaintiffs notice only of charges concerning the distribution of ten valium tablets. *Id.* At the hearing, the school's principal testified that three female students, Stacey Mixon, Patricia Dean, and Tammy Dean, stated they had received the drug Vivarin from the plaintiff. *Id.* Plaintiffs argued that the Board should have given them a list of these witnesses and an opportunity to cross-examine them. *Id.* at 973. The trial court allowed transcripts of the separate disciplinary review hearings of these three students, as well as those of six others, to be included in the record. *Id.* at 970.

[8] *Id.* None of the students making the Vivarin allegations appeared at the hearing. *Id.* at 969.

[9] *Id.* at 971. Plaintiffs requested Brandon Erwin and two other students who had testified about the valium distribution allegations before the Disciplinary Review Committee to appear at the Board meeting. *Id.* at 973. These students appeared and were cross-examined by plaintiff's counsel. *Id.*

[10] *Id.* at 970. Plaintiffs argued that evidence concerning the distribution of ten valium tablets to Winstead did not support a violation of any school rule since the incident occurred "off campus and not during school hours." *Id.* Plaintiffs maintained that since the testimony relating to drug distribution at school was conflicting, then this evidence was insufficient as well. *Id.* at 971.

[11] *Id.* at 971. The record disclosed that the plaintiffs' counsel knew that nine students had accused Regina, having questioned both principal and assistant principal concerning them. *Id.*

[12] *Id.* at 972. Nothing in the record of the Board hearing indicated that the Board considered the accusations involving the sale of Vivarin. *Id.*

[13] *Id.* at 970. In affirming the expulsion, the trial court also overruled the plaintiffs' motion to strike from the record the transcripts of the separate disciplinary review hearings of the other nine students. *Id.*

[14] *Id.* at 973. Plaintiffs suggested the appeal was moot since Regina had completed

that a school board has considered anything other than listed charges in making the decision to expel a student, and where there is sufficient evidence that the student has violated school policy, failure to inform the student of additional allegations or to give the student the opportunity to confront those accusers would not substantially prejudice the student so as to deny due process. *Jones v. Pascagoula Mun. Sep. School Dist.*, 524 So. 2d 968 (Miss. 1988).

Though recognition of an individual's right to be advised of the nature and basis of accusations against him can be traced to the Bible,[15] the Magna Carta set forth the earliest recorded expression of the concept of procedural due process in English law.[16] Edward III first chose to use the expression "due process of law"[17] to describe procedural safeguards in his formal confirmation of the Magna Carta.[18] Language reminiscent of both the Magna Carta and Edward III's provision appeared in early American colonial laws[19] as well as in the American Bill of Rights, which adopted the concept of due process of law in reference to actions taken by the federal government.[20] The Reconstruction Congress copied the language of the fifth amendment in drafting the fourteenth amendment,[21] which was meant to act as a similar re-

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the 1986 spring semester while the appeal was pending. *Id.* at 970. The court disagreed, finding that upholding of the plaintiff's expulsion would result in the nullification of her credit for the spring semester. *Id.* This potential loss of school credit was sufficient to present an actual controversy. *Id.*

[15] The Bible provides: "It is not the manner of the Romans to deliver any man to die, before that he which is accused have the accusers face to face, and have license to answer for himself concerning the crime laid against him." *Acts* 25:16.

[16] H. MEYER, THE HISTORY AND MEANING OF THE FOURTEENTH AMENDMENT 128 (1977). The Magna Carta proclaimed that no man would be imprisoned "except by the judgment of his peers and by the law of the land." *Magna Carta*, chap. 39 (1215).

[17] 28 Edw. 3, c. 1, 3 (1354). While not using the phrase "by the law of the land," Edward III promised "[t]hat no man of what state and condition that he be shall be ousted from his land nor from his tenement, nor taken, nor imprisoned, nor disinherited, nor put to death without being brought in answer by due process of law." *Id.*

[18] *See* H. MEYER, *supra* note 16, at 134-35 (Edward III's confirmation included "Great Charter" and Charter of Forest, in addition to other statutes utilized prior to his time).

[19] *Id.* at 140. An example of this trend appeared in New York's Charter of Liberties and Privileges of 1683, which included a clause resembling chapter 39 of the Magna Carta, and a clause modeled after Edward III's due process provision. *Id.* at 140-41.

[20] U.S. CONST. amend. V. The applicable text of the fifth amendment states: "No person shall. . .be deprived of life, liberty, or property, without due process of law. . . ." *Id.*

[21] *Id.* at amend. XIV, § 1. The fourteenth amendment states in part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . ." *Id.*

straint on actions of the individual state governments.[22]

Courts have established that the fourteenth amendment protects the rights of individuals from state action, including actions of a school board.[23] Students' rights, however, had played an insignificant role in school and college disciplinary actions[24] until the Fifth Circuit's landmark decision in *Dixon v. Alabama State Board of Education*.[25] The plaintiffs in *Dixon* were students at a tax-supported college, expelled[26] without having formal charges placed against them and without being afforded a hearing prior to their expulsion.[27] Recognizing the importance of education,[28] the Fifth Circuit Court of Appeals held that

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[22] H. MEYER, *supra* note 16, at 125-26. The procedural aspect of due process mandates that when governmental power is to be used against an individual, there exists a right to an objective procedure to ascertain "the basis for, and legality of such action." J. NOWAK, R. ROTUNDA, J. YOUNG, CONSTITUTIONAL LAW § 13.1 at 452 (3d ed. 1986).

[23] West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943). In *Barnette*, the Supreme Court held that a state board of education's action making it compulsory for public school children to salute the flag and pledge allegiance violated first amendment principles protected through the due process clause of the fourteenth amendment. *Id.* at 639. *See also* Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 506 (1969) (students retain constitutional rights at school); Cooper v. Aaron, 358 U.S. 1, 16-17 (1958) (state management of segregated schools not consistent with fourteenth amendment protection); Brown v. Board of Educ., 347 U.S. 483, 495 (1954) (school board's segregation of children in public schools violative of fourteenth amendment protection).

[24] *See, e.g.*, People *ex rel.* Bluett v. Board of Trustees, 10 Ill. App. 2d 207, 134 N.E.2d 635, 637 (1956) (student expelled for cheating not entitled to formal hearing at which she would be confronted by witnesses and given opportunity to cross-examine); Morrison v. City of Lawrence, 181 Mass. 127, 63 N.E. 400, 401 (1902) (student should have opportunity to be heard but school need not require other students to testify against him); State *ex rel.* Sherman v. Hyman, 180 Tenn. 99, 171 S.W.2d 822, 826 (1942), (student not allowed to cross-examine those testifying against him) *cert. denied*, 319 U.S. 748 (1943). *See generally* Seavey, *Dismissal of Students: "Due Process"*, 70 HARV. L. REV. 1406 (1957) (students not afforded normal procedural safeguards).

[25] 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961). One commentator noted that in *Dixon* "[t]he Constitution was first brought to the campus. . . ." Wright, *The Constitution on the Campus*, 22 VAND. L. REV. 1027, 1059 (1969).

[26] *Dixon*, 294 F.2d at 151-52. The Alabama State Board of Education expelled the plaintiffs from the Alabama State College for Negroes for their alleged participation in a "demonstration" at the Montgomery County Courthouse. *Id.* at 152. This "demonstration" consisted of a sit-in which occurred when the plaintiffs were refused service in the courthouse's segregated lunch grill. Wright, *supra* note 25, at 1030.

[27] *Dixon*, 294 F.2d at 154. The Board voted "on or about March 2, 1960" to expel the plaintiffs. *Id.* at 153-54. The plaintiffs were not officially notified of the expulsions until either March 4th or 5th. *Id.* at 154.

[28] *Id.* at 157. The court found that the due process clause protected the plaintiffs' "right to remain at a public institution of higher learning in which [they] were students in good standing." *Id.* at 156-57.

due process required notice of the specific charges against the student[29] and some opportunity for a hearing prior to the expulsion.[30] The court explained that the type of hearing required should vary depending on the particular circumstances of the case.[31] Where expulsion is involved, the court concluded that the student should receive a list of witnesses against him and the substance of their testimony.[32] The court added that the student also retained the opportunity to present a defense against the charges.[33]

The Fifth Circuit applied the *Dixon* holding to the suspension of high school students in *Williams v. Dade County School Board.*[34] In *Williams*, the high school principal suspended the plaintiff for forty days following an informal meeting at which the principal explained to the plaintiff's parents the nature of the acts allegedly committed.[35] The court not only found that the meeting was not a "hearing" within the meaning of *Dixon*,[36] but also that the purpose of the meeting was to

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[29] *Id.* at 158. The allegations should contain the grounds which would justify expulsion if proven. *Id.*

[30] *Id.* The court noted that due process did not require a "full-dress judicial hearing," including the right to cross-examine witnesses, which would be detrimental to the school's educational atmosphere. *Id.* at 159.

[31] *Id.* at 158. While the necessary degree of formality has varied, courts have not held school systems to the strict standards of criminal procedure. Comment, *Due Process Rights in Student Disciplinary Matters*, 14 J. C. & U. L. 359, 370-71 (1987). *See* Jenkins v. Louisiana State Bd. of Educ., 506 F.2d 992, 1000 (5th Cir. 1975) (requirements of due process in school suspension not equivalent to that essential to criminal trial); Norton v. Discipline Comm., 419 F.2d 195, 200 (6th Cir. 1969) (student discipline not analogous to criminal procedure); Esteban v. Central Mo. State College, 415 F.2d 1077, 1090 (8th Cir. 1969) (school regulations not measured by criminal procedure standards).

[32] *Dixon*, 294 F.2d at 159.

[33] *Id.* The court stated that the student's defense should include "either oral testimony or written affidavits of witnesses on his behalf." *Id.*

[34] 441 F.2d 299 (5th Cir. 1971). The Fifth Circuit encountered an argument of procedural due process in a high school setting years earlier in Woods v. Wright, 334 F.2d 369 (5th Cir. 1964), an appeal from a district court's refusal to enjoin a school superintendent from enforcing a board of education's order expelling or suspending students in Birmingham, Alabama. *Id.* at 371-73. The appellants maintained that the suspensions and expulsions without prior notice or hearing violated their due process rights. *Id.* at 374. Although the court of appeals granted the temporary restraining order, it held that the due process question was not properly before it for decision. *Id.*

[35] *Williams*, 441 F.2d at 300. The school principal originally suspended Williams, a senior at Miami Killian Senior High School, for ten days following his alleged participation in a "mob attack." *Id.* Subsequently, the principal imposed an additional 30-day suspension pursuant to Regulation 5114 of the Dade County, Florida, Board of Education. *Id.* at 299. This regulation provided for the additional period if deemed necessary by the school's principal and the Superintendent of Schools. *Id.* n. 1.

[36] *Id.* at 300-01. The Board argued that if the hearing provided was inadequate, it

explain to the parents that the principal had already reached a decision.[37] The court felt that a suspension of forty days was equal to the loss of a full school term,[38] a penalty of such magnitude that it should not be imposed without an attempt to properly ascertain the pertinent facts.[39] Applying the standards enunciated in *Dixon*, the court ruled that before suspending a student, disciplinarians should properly notify the student of the charges, provide him with the names of witnesses and a summary of their testimony, and give him an opportunity to refute the charges.[40]

In 1972 in *Pervis v. LaMarque Independent School District*,[41] the Fifth Circuit extended the requirements of procedural due process considered in *Williams* to high school suspensions of even longer duration. In *Pervis*, a high school principal suspended two students on February 9 and 16, respectively, for the remainder of the school term[42] allowing neither a hearing prior to suspension.[43] After both students filed suit against the school district in federal district court, the school's Board of Trustees, at the suggestion of the court,[44] held a hearing on May 4,

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was a result of the plaintiff's failure to contest the charges at the informal meeting with the school's principal. *Id.* at 300. The court disagreed with this contention, finding that the meeting was not called to weigh the facts objectively and arrive at a fair decision. *Id.*

[37] *Id.* Regulation 5114 did not require notification of the student's parents until after approval of the suspension. *Id.* n. 1.

[38] *Id.* at 301. The court distinguished *Williams* from *Banks v. Board of Public Instruction*. *Id.* In *Banks*, the district court upheld the constitutionality of a section of Regulation 5114, allowing a ten-day suspension without a hearing. Banks v. Board of Pub. Instruction, 314 F. Supp. 285, 293-94 (S.D. Fla. 1970), *vacated and remanded*, 401 U.S. 988 (1971). In *Williams*, the court found the principal and superintendent had levied the additional 30-day suspension "after tensions [had] beg[u]n to subside" and the need for expeditious action was not compelling. *Williams*, 441 F.2d at 301.

[39] *Williams*, 441 F.2d at 301. The court noted that it was not necessary to provide a student with the types of procedural protection provided a defendant in a criminal prosecution. *Id.*

[40] *Id.* at 302 (citing *Dixon*, 294 F.2d at 150).

[41] 466 F.2d 1034 (5th Cir. 1972).

[42] *Id.* at 1056. Conduct necessitating suspension included infractions of school rules relating to "tardiness, missing of classes, disruption of classes, disobedience, etc." *Id.* Both students, Pervis and McGrue, were eleventh grade students. *Id.*

[43] *Id.* Following the suspensions, Pervis's mother received a letter from the school's principal informing her of the suspension and detailing the infractions committed by her son. *Id.* The letter contained no mention of any right to a hearing or appeal. *Id.* McGrue's mother received a similar letter, which, while containing no explanation of the charges against the student, did advise the mother to contact the principal if she wished to appeal or present further evidence on her daughter's behalf. *Id.*

[44] *Id.* While the district court "suggested" that a hearing be conducted at which the students could appear and defend themselves, it refused to grant an order temporarily

at which the Board affirmed the suspensions.[45] The students argued that the failure to provide hearings prior to suspension violated their right to procedural due process.[46] The court of appeals ruled that the students received neither notice nor a fair hearing as required by *Dixon*.[47] Since the current suspensions were more serious than those involved in the *Williams* case, the court required "*Dixon*-like procedures."[48] Disagreeing with the district court's finding that the subsequent hearing cured the absence of an initial hearing,[49] the court concluded that the idea "that punishment cannot be imposed before a hearing is given" was basic to the idea of due process[50] and that vindication at a subsequent hearing still denied the students three weeks of education.[51]

Prior to 1972, the United States Supreme Court decided procedural due process issues through the application of an imprecise balancing of the individual's interest against the interest of the state in summary adjudications.[52] To remedy this situation, the Court in *Board*

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restraining the school district from continuing to exclude the students from school. *Id.*

[45] *Id.*

[46] *Id.* The students also argued that since suspension was pursuant to § 21.301 of the Texas Education Code, a three-judge district court should hear the case in accordance with §§ 2281 and 2284 of Title 28 of the United States Code. *Id.* The school district maintained that the suspension was pursuant to a school disciplinary regulation, thus, not requiring a three-judge court. *Id.* The court of appeals found that regardless of the authority requiring discipline, there need be no three-judge court as there was "no substantial question" concerning the constitutionality of § 21.301. *Id.* The court also rejected the students' argument that the statute was unconstitutionally vague, finding that any uncertainty in the statute could be clarified by reading it in context with other statutory provisions. *Id.* at 1057. As to the students' contention that the statute was unconstitutional for failing to require a hearing, the court found that the inclusion of the words "found guilty" in the statute implied that the statute's framers contemplated "some type of hearing." *Id.*

[47] *Id.* at 1058. The court noted that "[a]mong the basic guarantees [of procedural due process] are the right to be heard in one's own defense and the right to be given notice of the charges." *Id.*

[48] *Id.* The school board had suspended Pervis and McGrue for almost three months without the proper procedural protection in a situation similar to that in *Williams*, according to the court. *Id.*

[49] *Id.* At the hearing on May 4, the court ruled that the Board "did not attempt to impose any new punishment," but only affirmed the principal's earlier actions. *Id.*

[50] *Id.* Although there were occasions not requiring compliance with the requirements of *Dixon*, the court concluded these occasions would include those involving minimal punishment or violence. *Id.*

[51] *Id.*

[52] *See* Note, *Procedural Due Process and Short Suspensions From the Public Schools: Prologue to* Goss v. Lopez, 50 NOTRE DAME LAW. 364, 369 (1974) (Supreme Court's pre-*Roth* due process analysis viewed as imprecise). *See also* Boddie v. Connecti-

of Regents of State Colleges v. Roth[53] set forth definitive guidelines for making the determination of interests which the due process clause protected.[54] In *Roth*, the Wisconsin State University-Oshkosh, without explanation, refused a professor continued employment upon the expiration of his one-year contract.[55] Applicable state law left the retention of such employees to the complete discretion of university officials.[56] The Court delineated a two-phase analysis applicable in making procedural due process determinations.[57] First, a court should determine whether the fourteenth amendment's protection of liberty[58] or property encompassed the individual's interest,[59] looking to the "nature,"[60] rather than the "weight" of the interest involved.[61] Finding a protected

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cut, 401 U.S. 371, 378 (1971) (procedural requirements can vary depending on interests involved); Goldberg v. Kelly, 397 U.S. 254, 263 (1970) (extent to which due process must be provided depends on whether welfare recipient's interest in avoiding loss was greater than governmental interest in summary adjudication); Cafeteria and Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961) (considerations of what procedures due process required begins with determination of nature of government function involved and private interest affected); Hannah v. Larche, 363 U.S. 440, 442 (1960) (exact boundaries of due process are undefinable); Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 163-64 (1951) (due process cannot be limited to formula).

[53] 408 U.S. 564 (1972).

[54] *Id.* at 571.

[55] *Id.* at 566. Roth was an assistant professor of political science at Wisconsin State University-Oshkosh. *Id.*

[56] *Id.* at 567. The applicable Wisconsin statute provided: "All teachers in any state university shall initially be employed on probation. The employment shall be permanent, during efficiency and good behavior after four years of continuous service in the state university system as a teacher." WIS. STAT. § 37.31 (1) (1967). However, there were no statutory or administrative guidelines defining eligibility for re-employment beyond the fixed term of one academic year. *Roth*, 408 U.S. at 566-67.

[57] *Roth*, 408 U.S. at 570-71.

[58] *Id.* at 571. The Court noted that, "[i]n a Constitution for free people, there can be no doubt that the meaning of 'liberty' must be broad indeed." *Id.* at 572. *See* Bolling v. Sharpe, 347 U.S. 497, 499-500 (1954) (liberty not restricted except for proper governmental objective).

[59] *Roth*, 408 U.S. at 571. The Court stated that in order for an individual to have a property interest in a benefit, the individual must have "a legitimate claim of entitlement to it." *Id.* at 577. Independent sources, such as state law, would create the existing rules and understandings that supported claims of "entitlement" to benefits. *Id.*; *see, e.g.*, *Goldberg*, 397 U.S. at 262 (welfare benefits constituted statutory entitlement).

[60] *Roth*, 408 U.S. at 571. *See* Morrisey v. Brewer, 481 U.S. 471, 481 (1972) (whether procedural protections are due dependent upon whether fourteenth amendment encompassed nature of interest).

[61] *Roth*, 408 U.S. at 571. The Court noted that a "weighing process" has long been a part of the determination of the type of hearing required by due process in particular situations. *Id.* at 570. *See supra* note 52 and accompanying text.

interest, the court should then ascertain the procedures necessary to satisfy due process requirements.[62] In *Roth*, the majority reasoned that since the teacher had no claim of "entitlement" to the position under local law,[63] then there was no deprivation of property requiring a termination hearing.[64]

Applying the *Roth* analysis, the United States Supreme Court considered its first student suspension case in *Goss v. Lopez*.[65] In *Goss*, disciplinarians suspended students without hearings for periods of up to ten days.[66] Neither the applicable state statute[67] nor the school dis-

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[62] *Roth*, 408 U.S. at 570-71. In Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976) the Court promulgated a three-part analysis to ascertain what process was due in a given situation. Under this analysis, the factors to consider were: (1) the private interest affected by the government action; (2) the risk of an erroneous deprivation of that interest; and (3) the government's interest, including the fiscal and administrative burdens additional procedural requirements would involve. *Id.* at 335. *See* Nash v. Auburn Univ., 812 F.2d 655, 660 (11th Cir. 1987) (court applied *Eldridge* analysis in student disciplinary case); Gabrilowitz v. Newman, 582 F.2d 100, 105 (1st Cir. 1978) (same); Gorman v. University of R.I., 646 F. Supp. 799, 808 (D.R.I. 1986) (same); Picozzi v. Sandalow, 623 F. Supp. 1571, 1577-79 (E.D. Mich. 1986) (same); Jaksa v. Regents of Univ. of Mich., 597 F. Supp. 1245, 1248 (E.D. Mich. 1984) (same), *aff'd per curiam*, 787 F.2d 590 (6th Cir. 1986); Hart v. Ferris State College, 557 F. Supp. 1379, 1387 (W.D. Mich. 1983) (same); Bleicker v. Board of Trustees, 485 F. Supp. 1381, 1387-88 (S.D. Ohio 1980) (same); Ross v. Pennsylvania State Univ., 445 F. Supp. 147, 153 (M.D. Pa. 1978) (same). *See generally* Golden, *College Student Dismissals and the* Eldridge *Factors: What Process Is Due?*, 8 J. C. & U. L. 497 (1981) (examined manner in which courts have applied second step of *Eldridge* analysis in student disciplinary cases).

[63] *Roth*, 408 U.S. at 578. The Court arrived at this conclusion despite Roth's suggestion that most teachers hired by the college on a yearly basis were rehired. *Id.* at 578 n. 16. *But see* Perry v. Sindermann, 408 U.S. 593, 601-02 (1972) (university should give dismissed teacher opportunity to prove entitlement in light of institution's practices).

[64] *Roth*, 408 U.S. at 578. Although Roth did have an "abstract concern in being rehired," the Court concluded this "concern" was not sufficient to constitute a property interest necessitating a hearing. *Id.*

[65] 419 U.S. 565 (1975). *See* Note, *Constitutional Law*: Goss v. Lopez: *Much Ado About Nothing or the Tempest*, 7 Loy. U. Chi. L.J. 193, 195-96 (1976) (*Goss* was addition to limited number of cases in which Court abandoned traditional attitude of non-interference in school concern).

[66] *Goss*, 419 U.S. at 568. All of the students attended schools within the Columbus, Ohio, Public School System. *Id.* at 567. Eight of the students' suspensions were for participation in various forms of "disruptive behavior" on school premises. *Id.* at 569-70. The school files were silent as to the reasons for suspension of the ninth student. *Id.* at 571.

[67] *Id.* at 567. The Ohio Code provided the principal of an Ohio school with the authority to suspend a student for misconduct for up to ten days or to expel him. Ohio Rev. Code Ann. § 3313.66 (Anderson 1972). In either situation, the statute provided that the principal had the obligation to notify the student's parents within twenty-four hours, explaining the grounds for his action. *Id.*

trict's guidelines[68] required the disciplinarian to provide reasons prior to suspension nor to afford the suspended student the opportunity to contest the decision.[69] The Court found that school suspensions denied a student's property "entitlement" interest in educational benefits,[70] as well as the student's liberty interest in reputation.[71] Concluding that a ten-day suspension from school was not "de minimis" and, therefore, could not be imposed without procedural protection,[72] the Court held that for suspensions of ten days or less, a school must provide the student with oral or written notice of the charges against him.[73] Further-

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[68] *Goss*, 419 U.S. at 567. Under § 1010.14 of the Administrative Guide of the Columbus Public Schools, schools could suspend or expel students under § 3313.66 of the Ohio Code. *Id.* This was the only administrative regulation on the subject of suspensions and expulsions. *Id.* at 567 n. 1.

[69] *Id.* at 569-70. Subsequent to the suspensions, school authorities gave each student, along with his or her parents, the opportunity to attend a conference "to discuss the student's future." *Id.* at 570.

[70] *Id.* at 574. State law provided for a free education to all residents between five and twenty-one years of age. OHIO REV. CODE ANN. § 3313.48 to -.64 (Anderson 1972 and Supp. 1988). The Ohio Code also contained a compulsory school attendance law. *Id.* § 3321.04. The Court reasoned that "[h]aving chosen to extend the right to an education to people of [the suspended students'] class generally, Ohio may not withdraw that right on grounds of misconduct, absent fundamentally fair procedures to determine whether the misconduct has occurred." *Goss*, 419 U.S. at 574. Courts generally view public school attendance as "a protectable interest, a form of the 'new property.'" *See* Comment, *supra* note 54, at 1054 (state compulsory education laws indicated evidence of claim of protected interest). *See also Perry*, 408 U.S. at 601-02 ("entitlement" may be implied in light of institution's practices); Mass, *Due Process Rights of Students: Limitations on* Goss v. Lopez — *A Retreat out of the "Thicket"*, 9 J. L. & ED. 449, 459 (1980) (in state without compulsory free education, no "property" right in education could exist); Comment, *Due Process in School Discipline: The Effect of* Goss v. Lopez, 12 SAN DIEGO L. REV. 912, 922-23 (1975) (same). *But see* Comment, *supra* note 54, at 1054-55 (though compulsory education laws seemed to be strongest evidence of "claim of entitlement," actual codification was not necessary).

[71] *Goss*, 419 U.S. at 574-75. The Court held that if charges against a student became part of the student's record, they could damage seriously the student's reputation and standing at school as well as interfere with his educational and employment opportunities. *Id.* at 575.

[72] *Id.* at 576. Agreeing with the district court's holding that there were exceptional situations in which the requirements of notice and hearing could not be met, the Court concluded, however, that these situations involved students whose presence on school grounds "pose[d] a continued danger to persons or property or an ongoing threat of disrupting the academic process. . . ." *Id.* at 582. In such a situation, authorities could immediately remove the student from school, with the necessary notice and hearing following "as soon as practicable." *Id.* at 582-83.

[73] *Id.* at 581. The Court did consider that the total freedom of school authorities from notice and hearing requirements was necessary to enable schools to operate with "acceptable efficiency." *Id.*

more, if the student denied the charges, the school must give him an opportunity to explain his version of the incident.[74] The Court, however, stopped short of requiring that hearings in connection with short suspensions allow the student the right to obtain counsel, to confront and cross-examine witnesses, or to call his own witnesses,[75] stressing that its holding addressed only suspensions not exceeding ten days.[76] Longer suspensions or expulsions, the Court conceded, might require the affordance of more formal procedures to the student.[77]

Federal courts in Mississippi, as well as the Mississippi Supreme Court, have followed the *Goss v. Lopez* rationale in addressing the requirements of procedural due process for suspended or expelled high school students. In *Keough v. Tate County Board of Education*,[78] the Fifth Circuit Court of Appeals affirmed the district court in considering a procedural due process violation connected with a high school

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[74] *Id.* The Court noted that the hearing could take place immediately after notice. *Id.* at 582. In the majority of situations , the school official could "informally discuss the alleged misconduct with the student minutes after it has occurred." *Id.*

[75] *Id.* at 583. Trial-type procedures, the Court felt, would make the disciplinary process too costly, as well as destroy its utility as part of the educational process. *Id.* Simply allowing the student an opportunity to give his version of the events would apprise the disciplinarian of factual disputes and disagreements concerning "cause and effect." *Id.* at 583-84. At that point, the disciplinarian could allow more formal procedures if necessary. *Id.* at 584. Commentators have noted that those flexible *Goss* standards might be "unlikely to deter the school administrator unconcerned with the excuses or the constitutional rights of his charges." Note, *Due Process, Due Politics, and Due Respect: Three Models of Legitimate School Governance*, 94 HARV. L. REV. 1106, 1108-09 (1981). Instead, the informal meetings required by *Goss* were "valued largely for their symbolism." *Id.* at 1112. The divided case law on the role of counsel in disciplinary proceedings illustrates the need for the Court to issue more definitive guidelines on the subject. *See, e.g.*, Greenhill v. Bailey, 519 F.2d 5, 9 (8th Cir. 1975) (attorney's presence "would serve no useful purpose"); Gorman v. University of R.I., 646 F. Supp. 799, 806 (D.R.I. 1986) (due process did not require representation by counsel at suspension hearing); Jaksa v. Regents of Univ. of Mich., 597 F. Supp. 1245, 1252 (E.D. Mich. 1984) (same), *aff'd per curiam*, 787 F.2d 560 (6th Cir. 1986). *But see*, Dillon v. Pulaski County Special School Dist., 468 F. Supp. 54, 58 (E.D. Ark. 1978) (expelled student denied due process by school board's refusal to allow student's counsel to cross-examine accuser), *aff'd*, 594 F.2d 699 (8th Cir. 1979).

[76] *Goss*, 419 U.S. at 584.

[77] *Id.*; *see, e.g.*, Black Coalition v. Portland School Dist. No. 1, 484 F.2d 1040, 1045 (9th Cir. 1973) (students subject to expulsion must have hearing at which student has counsel and right to cross-examine witnesses). *See generally* Steinberg, *Student Suspension and Expulsion Proceedings in Tax Supported Institutions: What Process is Due?*, 7 ST. MARY'S L.J. 319, 329-31 (1975) (students subject to long suspension or expulsion should have legal representation and confrontation rights).

[78] 748 F.2d 1077 (5th Cir. 1984).

student's expulsion from school.[79] The alleged violation occurred following a meeting with the school principal during which he suspended the student Keough for ten days.[80] Subsequently, the Board of Education decided at a hearing to suspend Keough for the remainder of the school year, but allowed him to take first semester exams.[81] Keough argued that in two separate instances both the principal and the Board had violated his procedural due process rights[82] and that the district court had erred in considering his guilt or innocence in its review.[83] Following *Goss v. Lopez* the court found that the principal had given Keough "*some* kind of notice" and "*some* kind of hearing,"[84] concluding that the "informal give-and-take" between Keough and the principal met procedural due process requirements for short-term suspensions.[85] Furthermore, the Fifth Circuit found that not providing the list of witnesses until the day of the hearing would not be prejudicial where "the witnesses provided no surprises" against which the party lacked defenses.[86] To establish a denial of due process, the court ruled,

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[79] *Id.* at 1081.

[80] *Id.* at 1079. The principal suspended plaintiff, a senior at Independence High School in Tate County, Mississippi, for "repeated misbehavior in school." *Id.* at 1078. This misbehavior included the use of profanity, leaving school grounds without permission, and challenging the school's principal to a fight. *Id.*

[81] *Id.* at 1079. At the hearing on December 14, 1983, three of the plaintiff's teachers, the school's principal, and the school's vice-principal testified and submitted to cross-examination by the plaintiff. *Id.*

[82] *Id.* at 1079-80. Keough contended that his December 9 meeting with the principal violated procedural due process requirements for short-term suspensions since the meeting's purpose was to punish rather than to discover facts. *Id.* at 1080. He also maintained that more formal procedures were necessary in view of the long-term effect of a ten-day suspension during exams. *Id.* As to the December 14 meeting before the Board, Keough argued that he was not fully apprised of the nature of the meeting and that prior to the hearing date, the Board should have provided him with a list of testifying witnesses along with a summary of their testimony. *Id.*

[83] *Id.* at 1083. The district court should have considered only whether he had received sufficient procedural due process, Keough argued. *Id.* Keough raised this argument regarding the district court's alternative ground for its decision that notwithstanding a procedural due process violation Keough would lose, since based on his admission of the truth of the allegations, he suffered no attributable harm. *Id.*

[84] *Id.* at 1080 (citing *Goss*, 419 U.S. at 576) (emphasis in original). Keough's notice of his misconduct and his hearing or opportunity to state his case, both occurred during his confrontation with the principal Massey. *Id.* at 1079-80.

[85] *Id.* at 1080. The Fifth Circuit concluded that even though the suspension occurred during exams, more formal procedures were not necessary as *Goss* did not distinguish between ten day suspensions occurring during exam periods and those that did not. *Id.* The court also noted that the Board allowed Keough to take final exams. *Id.* at 1081.

[86] *Id.* at 1082. The court noted that normally a witness list should be provided to

an aggrieved party had to demonstrate "substantial prejudice."[87]

The Mississippi Supreme Court considered an allegation of denial of due process to a high school student in *Warren County Board of Education v. Wilkinson*.[88] In *Wilkinson*, the alleged denial occurred when a school board refused the student credit for a semester,[89] following a hearing at which no witnesses offered testimony against the student.[90] The court recognized the school district's power to discipline students,[91] but found that the Board neither complied with constitutionally mandated due process requirements,[92] nor its own self-im-

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satisfy due process requirements in cases involving long-term suspensions. *Id.* at 1081. *See* Sweet v. Childs, 507 F.2d 675, 681 (5th Cir. 1975) (names of witnesses included in list of charges); Boykins v. Fairfield Bd. of Educ., 492 F.2d 697, 701 (5th Cir. 1974) (students should have lists of witnesses and summary of their testimony); Dixon v. Alabama State Bd. of Educ., 294 F.2d 150, 159 (5th Cir.) (same), *cert. denied*, 368 U.S. 930 (1961). However, in *Dixon* the court added that the process due depended upon the particular circumstances of the case. *Dixon*, 294 F.2d at 158. In *Keough*, the superintendent set forth the charges against the plaintiff in a letter to the plaintiff's parents. *Keough*, 748 F.2d at 1081. The plaintiff also admitted that he was aware of at least two occasions in which he had violated school policy. *Id.* at 1082.

[87] *Keough*, 748 F.2d at 1083 (citing U.S. Pipe & Foundry v. Webb, 595 F.2d 264, 274 (5th Cir. 1979); Arthur Murray Studio, Inc. v. Federal Tax Comm'n, 438 F.2d 622, 624 (5th Cir. 1972)). The court found that Keough's admission of the truth of the charges was relevant to a finding of a lack of substantial prejudice. *Keough*, 748 F.2d at 1083.

[88] 500 So. 2d 455 (Miss. 1986).

[89] *Id.* at 461. The Board denied credit to the student Alexandra Renee Wilkinson, a sixteen year old sophomore, after finding her in violation of the school's alcohol and drug policy, a "Type IV offense" promulgated in the student handbook and involving the harshest punishments. *Id.* at 458, 461. The alleged violation occurred in the student's home when she and a friend consumed "two or three sips" of her father's beer prior to the last day of school. *Id.* at 456.

[90] *Id.* at 458. Although the student's father requested that the two accusing teachers appear at the hearing, these teachers were not made available. *Id.* Bypassing his right to appeal the decision of the Board, Mr. Wilkinson sought an injunction in the Chancery Court of Warren County. *Id.* at 457-59. The chancellor issued an injunction for denial of procedural due process and further awarded nominal damages and attorney's fees. *Id.* at 458. The Warren County School Board appealed. *Id.* at 455.

[91] *Id.* at 459-60. Citing Clinton Mun. Sep. School Dist. v. Byrd, 477 So. 2d 237, 240 (Miss. 1985), the court reemphasized the substantial authority of boards of education under MISS. CODE ANN. §§ 37-9-71 and 37-7-301 (1972) to suspend or expel students for violation of school policies in situations which advanced the school district's legitimate interest. *Wilkinson*, 500 So.2d at 459. *See, e.g.*, Shows v. Freeman, 230 So. 2d 63, 64 (Miss. 1969) (courts will not question school board's rule provided rule has some rational basis).

[92] *Wilkinson*, 500 So. 2d at 458. The court stated that the Board's failure to have the teachers available was a denial of the student's due process rights. *Id.* (citing Dillon v. Pulaski County Special School Dist., 594 F.2d at 699, 700 (8th Cir. 1979)).

posed procedural requirements.[93] In doing so, the Board punished the student for conduct that school regulations did not prohibit.[94]

In the instant case, the Mississippi Supreme Court reasoned that due to the fact that it was unclear whether the Board of Trustees had considered anything other than the listed charges[95] or, in any event, that the plaintiff lacked informal notice of the additional allegations,[96] then the plaintiffs had failed to demonstrate the substantial prejudice[97] required to sustain a violation of procedural due process.[98] The court further ruled that admission of hearsay from school employees did not deprive the plaintiff of confrontation rights, as courts treat hearsay testimony of school employees differently from hearsay statements of students.[99] Finding no substantial deviations[100] from the min-

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[93] *Wilkinson*, 500 So. 2d at 460. The Board had adopted a procedure whereby it would inform a student accused of violating school policy of the charges against him and the possible penalties. *Id.* Under the procedure, the student had the right to a hearing, in addition to the right to cross-examine witnesses against him, call witnesses of his own, have counsel represent him, and request in writing the names of the witnesses against him. *Id.* at 460-61. The court found that the Board ignored these guidelines, causing the hearing to become "no more than an inquiry and discussion." *Id.* at 461.

[94] *Id.* at 460. The court found that the school's alcohol policy clearly did not forbid the student's consumption of beer in her home. *Id.*

[95] Jones v. Pascagoula Mun. Sep. School Dist., 524 So. 2d 968, 972 (Miss. 1988). Dan Lee, Presiding Justice, wrote the court's opinion. *Id.* at 969.

[96] *Id.*; *see supra* notes 6-7.

[97] *Id.*; *see supra* note 85 and accompanying text.

[98] *Jones*, 524 So. 2d at 972. The court noted that "expulsion or suspension from school involves deprivation of a property interest protected by the Due Process Clause. . . ." *Id.* at 971 (citing *Goss*, 419 U.S. at 573-74).

[99] *Jones*, 524 So. 2d at 973. While hearsay testimony is generally inadmissible in judicial proceedings, hearsay testimony by school officials is admissible in student disiplinary proceedings. 2 J. RAPP, EDUCATION LAW, § 9.05 [3][f] (1984). *See, e.g.*, Tasby v. Estes, 643 F.2d 1103, 1106 (5th Cir. 1981) (court could determine rights in student disciplinary hearing upon hearsay evidence of school administrators); Boykins v. Board of Educ., 492 F.2d 697, 700-01 (5th Cir. 1974) (due process did not preclude basing expulsion on principal's hearsay testimony), *cert. denied*, 420 U.S. 962 (1975); Racine Unified School Dist. v. Thompson, 107 Wis. 2d 657, 321 N.W.2d 334, 337 (Wis. Ct. App. 1982) (hearsay statements from teachers and staff members admissible). *But see* School Bd. v. Department of Health, Educ., and Welfare, 525 F.2d 900, 906 (5th Cir. 1976) (to determine whether hearsay could constitute substantial evidence, court looked to certain factors which assured reliability and probative value); Fielder v. Board of Educ., 346 F. Supp. 722, 730 (D. Neb. 1972) (hearsay not allowed where hearing held 30 days after expulsion); De Jesus v. Penberthy, 344 F.Supp. 70, 75 (D. Conn. 1972) (where there was factual dispute, due process required "that readily available testimony be presented to fact-finders in person"); Franklin v. District School Bd., 356 So. 2d 931, 932 (Fla. Dist. App. 1978) (hearsay testimony alone insufficient by statute).

[100] *Id.* The court observed that since a school board lacked the power to subpoena,

imum procedural due process requirements,[101] the court determined the question to be whether or not there was sufficient evidence to support the charges against the plaintiff.[102] The testimony that the plaintiff had distributed drugs to a student at school,[103] the court ruled, constituted sufficient evidence to support the allegation that the plaintiff had violated the school's drug policy,[104] thus validating the expulsion.[105]

The Mississippi Supreme Court's decision in *Jones* represents a somewhat reluctant step by the court in the direction of judicial deference to the actions of school administrators in student suspension and expulsion cases.[106] By speaking in terms of "informal notice" of allega-

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the denial of a witness list would not always amount to a prejudicial denial of due process. *Id.*; *see supra* note 86 and accompanying text. The witnesses who had appeared before the Disciplinary Review Committee also attended the Board hearing and were cross-examined. *Jones*, 524 So. 2d at 972. Prior to the Board hearing, plaintiffs' counsel was aware that nine students had mentioned the plaintiff before the committee. *Id.* at 972. However, plaintiffs' counsel called only three students as witnesses at the Board hearing. *Id.*

[101] *Jones*, 524 So. 2d at 973. The court noted that, at the very least, due process required notice and an opportunity to be heard. *Id.* at 972; *see supra* notes 72-74 and accompanying text. The court observed that the Board granted no more than the "barest minimum" of the required due process. *Jones*, 524 So. 2d at 973. Stating that where charges of misconduct are denied by the student, and the sole proof is the testimony of other students, the court ruled that "school boards should be especially sensitive to rights of students to know the complete nature of the changes against [them]." *Id.*; *see supra* notes 29, 72 and accompanying text. Confrontation rights may not be necessary; however, the court should provide written statements of those students not appearing. *Jones*, 524 So. 2d at 973. In addition, the court concluded that where there were multiple allegations, the judge should make findings of fact. *Id.* Although the court noted that the trial court possibly should not have allowed the other students' disciplinary hearing transcripts to be included in the plaintiff's record, it did not resolve this issue. *Id.* Its only concern was "whether the administrative proceedings were conducted according to due process requirements and whether the board acted on sufficient evidence." *Id.* at 972-73.

[102] *Jones*, 524 So.2d at 971.

[103] *Id.*; *see supra* note 6. The court noted that because of the evidence linking the plaintiff to drug distribution at school, it did not reach the question of whether a school board might discipline a student for similar activities off campus. *Id.*; *see supra* note 94 and accompanying text. The evidence against the plaintiff was one of the factors the court used to distinguish this case from the result in *Wilkinson*. *Jones*, 524 So. 2d at 972; *see supra* notes 88-94 and accompanying text. In *Wilkinson*, the court did not base its decision solely on the board's failure to adequately notify the student of the charge against her, but instead "looked to the Board's failure to provide witnesses against the student and to the substantive failure of the proof to show a violation of school rules." *Jones*, 524 So. 2d at 972.

[104] *Jones*, 524 So.2d at 971.

[105] *Id.* at 973.

[106] *See supra* note 91 and accompanying text.

tions[107] and a student's failure to demonstrate "substantial prejudice,"[108] the court seemed to accept the laxity of a school board in providing procedural safeguards.[109] This acceptance was only emphasized by the court's failure to hold the school board in *Jones* to the standards the court set forth at the close of the opinion.[110] The court then attempted to justify its decision by finding there was "sufficient evidence" to support the allegations against the plaintiff.[111] The question now becomes, "[w]hat procedures may a school board fail to afford and still grant the 'barest minimum' of due process?"[112] The United States Supreme Court, by limiting its holding in *Goss* to short suspensions,[113] left jurisdictions free to formulate their own guidelines as to what procedures would satisfy due process requirements when longer suspensions or expulsions were involved.[114] The resulting lack of uniformity,[115] coupled with results such as those reached in *Jones*, demonstrates the need for the Court to intervene in the proper situation and delineate procedural guidelines applicable when the sanctions against students become so severe.

David Burns

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[107] *See supra* text accompanying note 96.
[108] *See supra* note 82 and accompanying text and text accompanying note 97.
[109] *See supra* note 101 and accompanying text.
[110] *See supra* note 101.
[111] *See supra* notes 101-103 and accompanying text.
[112] *See supra* note 101.
[113] *See supra* notes 75-77 and accompanying text.
[114] *See id.*
[115] *See supra* notes 75, 77, 86, and accompanying text.

Schools — Education for All Handicapped Children Act of 1975 — School Officials May Not Unilaterally Change the Current Educational Placement of a Student Protected Under the Act

Respondents[1] brought suit in the United States District Court for the Northern District of California[2] asserting violation of their statutory rights[3] and requesting injunctive relief against petitioners'[4] efforts

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[1] Respondent John Doe was an emotionally disturbed child deemed handicapped within the meaning of the Education for All Handicapped Children Act of 1975. Honig v. Doe, 108 S. Ct. 592 (1988). Doe brought suit against local school officials and the California Superintendent of Public Instruction on a variety of allegations, ranging from failure to establish a policy regarding the discipline of disabled students to the failure of the former Superintendent of Public Instruction to intervene when the San Francisco United School District denied Doe his rights under the Education for All Handicapped Children Act [Act]. *Id.* at 599. Respondent Jack Smith, who had a propensity for aggressive behavior, was also handicapped within the meaning of the Act. *Id.* Since the claims raised by Doe and Smith were similar, Smith petitioned the district court to intervene, and the court granted the request. *Id.* at 600.

[2] Doe *ex rel.* Gonzales v. Maher, 793 F.2d 1470, 1470 (9th Cir. 1986). Judge Marilyn H. Patel presided. *Id.*

[3] Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (codified as amended at 20 U.S.C. §§ 1400-1461 (1982)). The statute explicitly acknowledges:

> The Congress finds that (1) there are more than eight million handicapped children in the United States today . . . (3) more than half of the handicapped children in the United States do not receive appropriate educational services which would enable them to have full equality of opportunity . . . (4) one million of the handicapped children in the United States are excluded entirely from the public school system and will not go through the educational process with their peers.

Id. §§ 1400(b)(1), (3), (4) (1982). *See also* S. Rep. No. 168, 94th Cong., 1st Sess. 8 (1975) ("[O]f the more than 8 million children . . . with handicapping conditions . . . only 3.9 million such children are receiving an appropriate education. 1.75 million handicapped children are receiving no educational services at all, and 2.5 million handicapped children are receiving an inappropriate education."), *reprinted in* 1975 U.S. Code Cong. & Admin. News 1425, 1432.

When Doe assaulted a fellow student and admitted his act, the school principal suspended him for five days. *Honig*, 108 S. Ct. at 599. On the last day of the suspension, the Student Placement Committee (SPC) of the San Francisco United School District (SFUSD) notified Doe's mother that the committee not only recommended permanent expulsion of her child, but also recommended his continued suspension until expulsion proceedings were completed. *Id.* at 598-99. Doe's suit alleged that the indefinite suspension and proposed expulsion violated § 1415(e)(3),the "stay-put" provision of the Act. *Id.*

to expel respondents from school.[5] The district court granted partial summary judgment for the respondents on their statutory claims[6] and permanently enjoined petitioners from taking any expulsion action that would affect the students' current educational placement.[7] The

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at 599. Doe sought a temporary restraining order to cancel the (SPC) hearing and an order that required school officials to call an Individualized Education Program (IEP) meeting. *Id.* Statutory construction provided that IEP meetings were to be attended by a representative of the local school district, the child's teacher, the child's parents or guardian and, when appropriate, the disabled child. 34 C.F.R. 300.344 (1978). The IEP objectives included evaluating the disabled child's correct educational performance, projecting short and long term educational goals and deciding the method or teaching services required to attain those goals. *Id.* § 300.346. The purpose of the IEP meeting was to serve "as a communication vehicle between parents and school personnel," and to enable them "to jointly decide what the child's needs are, what services will be provided to meet those needs, and what the anticipated outcomes may be." 34 C.F.R. § 300 app. c.(I)(a) (1986).

[4] *Maher*, 793 F.2d at 1478. Doe brought suit against local and district officials of the San Francisco United School District and the State Superintendent of Public Instruction, Wilson Riles. *Id.* However, during the pendency of the suit, Bill Honig succeeded Riles in office as California Superintendent of Public Instruction. *Id.* The plaintiffs-respondents prayed for injunctive and declaratory relief against the defendants in district court. *Id.* Plaintiffs-respondents additionally asked for damages against all parties in both their official and individual capacities. *Id.*

[5] *Honig*, 108 S. Ct. at 598-99. Doe attended the Louise Dombard School, a developmental center for disabled children. *Id.* at 598. On November 6, 1980, Doe choked a student with enough force to leave abrasions on the student's neck. *Id.* Doe also kicked out a window while being escorted to the principal's office after the altercation. *Id.* The principal initially suspended Doe for five days, but then proposed an extended suspension until completion of expulsion proceedings against Doe were resolved. *Id.* at 598-99. Respondent Smith was a student in a half-day program at A.P. Giannini Middle School, a regular public school. *Id.* at 599. The principal warned plaintiff-respondent Smith's grandparents that the respondent participated in "disruptive behavior" including stealing, extortion and a propensity for making sexual comments to female students. *Id.* On November 4, 1980, when Smith continued his disruptive behavior, the principal suspended him for five days and recommended permanent expulsion from the San Francisco United School District system. *Id.* at 599-600.

[6] *Maher*, 793 F.2d at 1478. Section 1415(e)(3) of the Act set forth the "stay-put" provision. 20 U.S.C. § 1415(e)(3) (1982). The Act provided that a student's "current educational placement" should remain the same pending administrative proceedings under the Act. *Id.* The district court found that since there was no "dangerousness" exception to the "stay-put" provision, any indefinite suspension pending a completion of expulsion proceedings constituted a direct violation of the statute. *Maher*, 793 F.2d at 1478.

[7] *Mayer*, 793 F.2d at 1478. The district court, in a lengthy declaratory judgment and permanent injunction, directed the state to provide direct services to a student when any local educational agency was unwilling or unable to comply with the educational mandate of the Act. *Id.* The district court additionally enjoined the state to either legislate a policy or develop a set of regulations to discipline handicapped students and to establish a system of checks to ensure local adherence to federal regulations governing disabled

United States Court of Appeals for the Ninth Circuit affirmed the district court order with modification.[8] The United States Supreme Court, *held*, affirmed.[9] Where school administrators seek to exclude disabled students from the classroom based upon the implication that a "dangerousness" exception to the statutory enactment to assure all handicapped children an appropriate public education existed, and where

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students. *Id.*

[8] *Id.* at 1476. The court of appeals affirmed the district court's holding that use of an indefinite suspension of a disabled child pending expulsion proceedings constituted a prohibited "change in placement" under § 1415(e)(3). *Id.* at 1485-86. The court of appeals additionally affirmed the district court's finding that a state must provide direct services to a disabled student when local school officials failed to do so. *Id.* at 1491-92. However, the court of appeals modified the district court's ruling on fixed suspensions, holding that suspensions up to thirty school days were not in violation of the Act's provisions. *Id.* at 1484.

[9] *Honig*, 108 S. Ct. at 606-07. The United States Supreme Court addressed the mootness issue extensively. *Id.* at 601-04. Since respondent Doe was twenty-four years old by the time the case was heard, the Court held that, as to Doe, the case was moot, as he was no longer entitled to the protection and benefits afforded children between the ages of three and twenty under the Act. *Id.* at 601. However, as to respondent Smith, the Court found that his case was justiciable. *Id.* Smith was only twenty-one years old, and, therefore, entitled to benefits provided under the Act. *Id.* at 601-02. The Court noted that there was a reasonable likelihood that Smith would once again suffer denial of Act entitlements that gave rise to the suit. *Id.* at 603. Thus, the conduct complained of by Smith was "capable of repetition yet evading review," hence justiciable by the court. *Id.* at 601. The Court affirmed the appeals court's holding that the "stay-put" provision prohibited school officials from unilaterally excluding disabled students from the classroom for dangerous or disruptive conduct pending review of their case and agreed that there was no "dangerousness" exception to the Act. *Id.* at 605. The Act, as interpreted by the Court, required that the student remain in his current educational placement. *Id.* The Court, however, disagreed with the court of appeals regarding maximum time limits on temporary suspensions, holding that suspensions in excess of ten days constituted a prohibited "change in placement." *Id.* at 607. If under the appropriate circumstances school officials needed to enjoin a student from attending school, the Court reasoned that adequate relief could be found under § 1415(e)(2), providing for injunctive remedy through the courts. *Id.* at 606. However, in such a situation, the Court indicated that a strong presumption existed in favor of the student, and that the Court would have to balance the student's right to a "free appropriate public education" against the school's interest in maintaining a safe learning environment for all students. *Id.* The statute currently defines the term "free appropriate education" as:

> [S]pecial education and related services which (A) have been provided at public expense under public supervision and direction, without charge, (B) meet the standards of the State educational agency, (C) include appropriate preschool, elementary, or secondary school education in the state involved, and (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.

20 U.S.C. § 1401(18) (1982).

completion of review proceedings affecting students' educational placement under the Act remained incomplete, a school may not unilaterally suspend those students beyond a ten day period without implicating the "change in placement" prohibition of 20 U.S.C. section 1415(e)(3). *Honig v. Doe*, 108 S. Ct. 592 (1988).

Prior to the enactment of the Education for All Handicapped Children Act (the Act),[10] insufficient funding[11] limited the right of handicapped children to free appropriate education.[12] Local school districts were unsuccessful, and at times uncooperative,[13] in implementing effective plans to educate the exceptional child.[14] In response to the predicament of the nation's handicapped,[15] Congress passed the Act to

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[10] *See supra* note 3.

[11] S. REP. No. 168, 94th Cong., 1st Sess. at 6.

[12] Brown v. Board of Educ., 347 U.S. 483, 493 (1954).

[13] Mills v. Board of Educ., 348 F. Supp. 866, 873 (D.D.C. 1972). In *Mills*, the plaintiffs were school children excluded from school by the District of Columbia School Board after being "labelled as behavioral problems, mentally retarded, emotionally disturbed or hyperactive . . . ." *Id.* at 868. The school board initially admitted the denial of education to the plaintiffs and agreed to a stipulated consent, but failed to submit their plan to the court as ordered. *Id.* at 871-73. The court then held that the School Board was required "to provide a publicly supported education for these 'exceptional' children." *Id.* at 876. When the school board argued that this duty was too great a burden to bear because of insufficient funds, the court held that lack of money was not an excuse. *Id. See generally* Haggerty and Sacks, *Education of the Handicapped: Towards a Definition of an Appropriate Education*, 50 TEMP. L.Q. 961, 971-72 (1977)(elements of remedy fashioned in *Mills* included zero rejection, individualized assessment and placement, least restrictive alternative, notice and hearing, and personal rights). The *Mills* court also held that due process required a pretermination of classification hearing or a preexclusionary hearing for specialized classes. *Mills*, 348 F. Supp. at 875. *See generally* Kirp, Buss, and Kuriloff, *Legal Reform of Special Education: Empirical Studies and Procedural Proposals*, 62 CALIF. L. REV. 40, 89 (1974)(confusion over *Mills* decision caused many educators to fear loss of discipline and control in name of due process).

[14] S. REP. No. 168, 94th Cong., 1st Sess. at 7. The first such plan implemented was the result of a consent decree obtained by the Pennsylvania Association for Retarded Children (PARC). Pennsylvania Ass'n for Retarded Citizens v. Pennsylvania, 343 F. Supp. 279, 302-303 (E.D. Pa. 1972). Schools had excluded the plaintiffs, mentally retarded school children, from free public education, determining that they were "uneducable" and, therefore, under state law, not entitled to state supported education. *Id.* at 281-82. Although plaintiffs challenged the state law as unconstitutional, the court could not reach the issues raised because of the stipulation and consent agreement between the parties. *Id.* at 284-88. The court determined, however, that the plaintiffs had "established a colorable claim under the Due Process Clause." *Id.* at 295. *See generally* Weintraub and Abeson, *Appropriate Education For All Handicapped Children: A Growing Issue*, 23 SYRACUSE L. REV. 1037, 1057 (1972)(*Mills*' and *PARC's* movement to due process as determining factor for placement of exceptional children frowned upon by educators as destabilizer of system).

[15] S. REP. No. 168, 94th Cong., 1st Sess. at 5; *see* Note, *Enforcing the Right to an*

alleviate the financial problems associated with appropriate placement by the local school system.[16] The legislation provided that a party could bring a civil action if he was unhappy with the results of a school district's decision concerning his educational placement.[17] The Act further allowed the child in question to be admitted or permitted to retain his current placement pending the outcome of the litigation.[18]

Courts examined the provisions of the Act for the first time in *Stuart v. Nappi*.[19] The plaintiff, an emotionally disturbed high school student, sought injunctive relief against her school after she was suspended for disruptive conduct.[20] The issue before the court was

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"Appropriate" Education: The Education For All Handicapped Children Act of 1975, 92 HARV. L. REV. 1103, 1121 (1979)(factor in Congress' decision to pass Act was desire to accelerate mainstreaming of exceptional children and to rectify practice of "dumping" such students into inappropriate classes).

[16] 20 U.S.C. § 1400(c) (1982). *See generally* Note, *The Education For All Handicapped Children Act: Opening the Schoolhouse Door*, 6 N.Y.U. REV. L. & SOC. CHANGE 43, 62-63 (1976-77)(praises Act for revolutionary advances in human rights and education for handicapped despite flaws of expense and increased burdens on educators).

[17] 20 U.S.C. § 1415(e)(2) (1982). The statute provides in full:

> Any party aggrieved by the findings and decision made under subsection (b) of this section who does not have the right to an appeal under subsection (c) of this section, and any party aggrieved by the findings and decision under subsection (c) of this section, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

Id.

[18] *Id.* § 1415(e)(3). The statute provides in full:

> During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parent or guardian, be placed in the public school program until all such proceedings have been completed.

Id.

[19] 443 F. Supp. 1235 (D. Conn. 1978).

[20] *Id.* at 1237-39. School authorities previously had classified the plaintiff into a special education program. *Id.* at 1238. The plaintiff's teacher requested a meeting concerning reclassification after plaintiff's attendance had dropped. *Id.* However, this meeting never occurred. *Id.* at 1239. During this period of non-attendance the plaintiff participated in several school disruptions which brought about her ten-day suspension. *Id.* During a hearing following the disciplinary suspension, the superintendent called for her expulsion. *Id.*

whether the "stay-put" provision of the Act[21] prohibited the expulsion of the student while she was awaiting the outcome of her action.[22] The court relied on the regulations of the Department of Health, Education and Welfare, implemented to carry out the Act, and the comments thereto[23] in deciding that expulsion was inappropriate.[24] The court found that expulsion would be an unauthorized change in the child's educational placement and, therefore, repugnant to the Act.[25] However, reasoning that temporary suspension for up to a maximum of ten days was not a change in placement,[26] the court concluded that the action was the appropriate procedure when dealing with a student who endangered the safety of others at school.[27]

In 1979, the United States District Court for the Western District of New York applied the safeguards of the Act to a handicapped child in *Sherry v. New York State Education Department.*[28] In *Sherry*, the plaintiff, a legally handicapped child, sought injunctive relief regarding her suspension from the State School for the Blind.[29] The plaintiff en-

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[21] 20 U.S.C. § 1415(e)(3) (1982).

[22] *Stuart*, 443 F. Supp. at 1241. The court reasoned that the plaintiff had the right to stay in her current placement pending the outcome of the action even though that right was in direct conflict with the school's disciplinary procedures. *Id.*

[23] 34 C.F.R. § 300.513 (1988). The comment states: "[W]hile the placement may not be changed, this does not preclude a school from using its normal procedures for dealing with children who are endangering themselves or others." *Id.*

[24] *Stuart*, 443 F. Supp. at 1242. The court pointed out that the regulations did not permit expulsion during the pendency of the plaintiff's civil action. *Id. See generally* Kenny, *Education of All the Handicapped*, 12 URB. LAW. 505, 507 (1980)(educators are hampered by lack of guidelines and must proceed on case-by-case method without use of expulsion).

[25] *Stuart*, 443 F. Supp. at 1243. The court reasoned that the law entitled handicapped children to an educational placement in the "least restrictive environment." *Id.* at 1242. This meant to the court that there would be a range of appropriate placements with at least one fashioned to meet the needs of the student. *Id.* However, expulsion was not an option in this continuum, stated the court, since it had the effect of both changing placement and restricting changes to alternative placements. *Id.* at 1242-43.

[26] *Id.* at 1242. The court noted that the Act had procedures to change placement which superseded the use of expulsion. *Id.* Suspension, however, did not alter the student's placement, or the ability to obtain a change in placement, according to the court. *Id.*

[27] *Id. But see* Bender and Lorant, *Public Law 94-142: Challenging Individualized Education Programs Through Due Process Considerations*, 7 W. ST. U. L. REV. 137, 151 (1980)(interpreted *Stuart* allowing expulsion if child was endangering others).

[28] 479 F. Supp. 1328 (W.D.N.Y. 1979).

[29] *Id.* at 1331. The plaintiff contended that the school failed to provide her with a proper due process hearing in addition to other procedural safeguards of the Act. *Id.* at 1337-38.

gaged in self-abusive behavior that ultimately led to hospitalization for injuries.[30] When the child's mother requested that her daughter be returned to school, the board refused, alleging insufficient supervisory staff.[31] The school officials finally suspended the plaintiff on December 29, 1978.[32] The New York court first held that the Act insured the rights of handicapped children to a "free and appropriate public education."[33] While the plaintiff's educational placement remained unchanged[34] until the indefinite suspension on December 29, 1978,[35] the

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[30] *Id.* at 1330. The plaintiff, legally blind and deaf, suffered from brain damage and an emotional disorder which made her self-abusive. *Id.* Although the court did not indicate what type of injuries the plaintiff suffered, it was obvious from the court's language and subsequent actions by the school that the injuries were self-inflicted. *Id.* at 1330-31.

[31] *Id.* The superintendent said that the plaintiff required constant supervision to prevent her from seriously injuring herself and that the school lacked sufficient student-to-staff ratio to supervise such a self-abusive student. *Id.* at 1330.

[32] *Id.* The plaintiff, Deloween Sherry, missed two months of school between the time of the incident and official suspension. *Id.*

[33] *Id.* at 1335. The court also stated that handicapped children deserved the special services required to meet their individual needs assured them under the Act. *Id.*

[34] *Id.* at 1337. Since the plaintiff's educational placement remained unchanged, the procedural requirements of the Act were not necessary. *Id.*

Following the decision in *Sherry*, plaintiffs, in a suit filed in Maryland, unsuccessfully relied on *Sherry* in an attempted circumvention of procedural requirements under the Act. H.R. v. Hornbeck, 524 F. Supp. 215, 221 (D. Md. 1981). In *H.R.*, parents of thirteen handicapped school children in various Maryland counties brought suit against their respective school superintendents, challenging the "exclusion of handicapped children from educational services under school disciplinary procedures used for normal school children." *Id.* at 216. The parents contended that justifiable educational placement changes arose only after a determination by special education experts. *Id.* The defendants moved for dismissal arguing that the plaintiffs had failed to exhaust all the administrative proceedings provided under the Act prior to the commencement of a suit in district court. *Id.* The plaintiffs, in response to the motion, relied on the absence of the procedural requirements prior to the commencement of suit, as in *Sherry*. *Id.* However, the court distinguished the cases noting that since the state in *Sherry* failed to provide for procedural hearings under the Act, pursuit of administrative proceedings was futile. *Id.* In *H.C.*, however, as the state of Maryland had complied with the procedures established under the Act, the court required the plaintiffs to exhaust all administrative remedies prior to judicial review, dismissing the lawsuit. *Id.* at 221.

See School Bd. of Prince William County v. Malone, 762 F.2d 1210, 1217 (4th Cir. 1984)(relying in part on decision in *Sherry* upholding right of state officials to review expulsion decisions of local school boards). In *Malone*, school officials expelled a fourteen-year-old mentally handicapped student after he participated as a go-between in drug transactions. *Id.* at 1212. Adhering to procedures under the Act, a local screening committee composed of special education professionals first reviewed the suspension of the student, and found that his drug activities were unrelated to his handicap. *Id.* Thereafter, the school board expelled the student from school. *Id.* Later, a local hearing officer concluded that learning disabilities caused the misbehavior, and a state review officer

court held that the suspension constituted a significant change in her educational placement in violation of the procedural safeguards afforded handicapped children under the Act.[36]

The Fifth Circuit Court of Appeals found procedural violations of the Act in 1981 in *S-1 v. Turlington*,[37] a case involving expulsion[38] of the plaintiffs[39] for alleged misconduct.[40] The officials argued that S-1's misconduct was not a product of his handicap.[41] The *S-1* court initially held that an expulsion constituted a change in educational placement, and that the Act mandated certain procedural benefits for expelled handicapped students.[42] School officials could, however, expel a handi-

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affirmed the decision. *Id.* at 1213. When the school board filed a complaint in district court, requesting reinstatement of expulsion, the district court dismissed the suit. *Id.* On appeal to the Fourth Circuit, the school board argued that its decision to expel the student was not reviewable since the misconduct occurred when the child was in an appropriate placement. *Id.* at 1215. The appeals court found the reasoning of the board to be unsound, reiterating the holding in *Sherry* that an expulsion constituted a change in placement which prompted review under the Act. *Id.* at 1214. *See also* John A. v. Gill, 565 F. Supp. 372, 377 (N.D. Ill. 1983)(relying on *Sherry* to maintain jurisdiction over suit based on possibility that plaintiff child faced future delays in Act appeals process).

[35] *Sherry*, 479 F. Supp. at 1337. When the formal indefinite suspension began on December 29, school authorities had changed the current educational placement of the plaintiff within the meaning of the Act. *Id.*

[36] *Id.* at 1337-38. The court indicated that although the temporary suspension was not a violation of the "stay-put" provision of the Act, the indefinite suspension constituted a violation of that provision. *Id.* The court distinguished the two provisions by indicating that the latter constituted a "significant change in educational placement." *Id.*; *see* Doe v. Rockingham County School Bd., 658 F. Supp. 403, 409 (W.D. Va. 1987)(school officials who required student to remain on suspension during pendency of administrative proceedings violated "stay-put provision"); Board of Educ. v. Illinois State Bd. of Educ., 531 F. Supp. 148, 150 (C.D. Ill. 1982)(five-day disciplinary suspension of handicapped child "who knew better" was not change in placement).

[37] 635 F.2d 342 (5th Cir.), *cert. denied*, 454 U.S. 1030 (1981).

[38] *Id.* at 344. The plaintiffs included eight students who attended Clewiston High School of Henry County, Florida. *Id.* The plaintiffs were either educable mentally retarded (EMR), mildly mentally retarded, or EMR/dull normal. *Id.*

[39] *Id.* The plaintiffs, seeking preliminary and permanent injunctive relief, wanted the court to compel state and local officials to provide them with educational services required under the Act. *Id.*

[40] *Id.* The misconduct included masturbation, insubordination, vandalism, and various other offenses. *Id.* n.1. The expulsions lasted for approximately one year and a half. *Id.*

[41] *Id.* at 347. The trial court ruled that school board officials did not have the necessary knowledge to reach such a decision. *Id.*

[42] *Id.* at 348. *But see* Wellock, *Developments in Education Law: 1981*, 15 CLEARINGHOUSE REV. 813, 822 (1982) (indicating confusion concerning practical implications of ruling which expressly recognized expulsion as disciplinary tool, yet concomitantly finding expulsion to be "change in educational placement"); *see also*, Blue v. New Haven Bd. of

capped student when his misconduct was not a result of his handicap.[43] The court concluded that a "trained and knowledgeable group of persons" should determine whether the student's behavior was a result of his handicapped condition.[44]

The involuntary transfer of a handicapped student from one school to another was the subject for an Eleventh Circuit appeal in *Victoria L. v. District School Board*.[45] School officials transferred Victoria L., who had a special learning disability,[46] from a public high school to a school reserved for disruptive students[47] because of her dangerous behavior.[48] Victoria L., arguing that the transfer violated both her equal protection rights and those under the Act,[49] sought to remain in the high school pending completion of the lawsuit.[50] School officials countered with expert testimony showing Victoria L. benefitted from a mixture of special education and regular classes at the new

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Educ., No. N81-41 (D. Conn. 1981)(least restrictive environment rule violated when school officials placed student on homebound instruction pending expulsion hearing). Thus, according to commentators, school officials would face difficulty in deciding the appropriate educational services for an expelled student which would meet judicial approval. Wellock, *supra*, at 822.

[43] *S-1*, 635 F.2d at 348. Although reasoning that expulsion remained a proper disciplinary measure, the court also indicated that it opposed a complete cessation of educational services during the expulsion. *Id.*

[44] *Id.* at 350. At least one author has indicated that *S-1* was a step in the wrong direction. *See* Champion, *The Discipline of Special Education Students in Public Schools*, 12 CAP. U.L. REV. 211, 227 (1982)(stating that expulsion "circumvents the goal of the federal laws, which is to provide every handicapped child with a free appropriate education in the least restrictive environment"). Stating that there is really no true way to separate the conduct of a handicapped student from his handicap, the commentator argued for an amendment to the federal laws prohibiting expulsions of all handicapped students. *Id.* In support of this conclusion, he pointed out that expulsions were "catastrophic" to the education of handicapped students. *Id.*

[45] 741 F.2d 369 (11th Cir. 1984).

[46] *Id.* at 371. The court characterized her disability as mild. *Id.*

[47] *Id.* The public high school was Cape Coral High School in Lee County, Florida. *Id.* The school designated for "disruptive and disinterested students" was the Alternative Learning Center. *Id.*

[48] *Id.* Victoria L.'s conduct "had not only proven unacceptable, it had been dangerous." *Id.* She committed relatively minor infractions such as smoking, missing classes and insubordination. *Id.* Additionally, she carried a razor blade and martial arts weapons to school and threatened to injure or kill a fellow student. *Id.*

[49] *Id.* Victoria L. contended the Act guaranteed her a public education, arguing the transfer discriminated against her on the basis of her handicap in violation of the fourteenth amendment. *Id.* at 372. She further maintained the transfer conflicted with her procedural rights under the Act and the due process clause of the fourteenth amendment. *Id.* at 371.

[50] *Id.*

school.[51] In response to the constitutional claim, the court reiterated earlier judicial findings that the Act offered the only redress for equal protection violations of a right to a public, special education,[52] repeating a Supreme Court ruling that the Act forbade a court from substituting its judgment as to educational policies for that of a school.[53] Despite the Act's requirement that special education students be educated in regular classes as much as possible,[54] the court concluded there was no evidence to show Victoria L.'s new environment was unnecessarily restrictive in view of school officials' desires to maintain safe schools.[55] Furthermore, the court held that the Act did not entitle Victoria L. to remain in her old school until adjudication of her suit.[56] School officials retained authority to transfer prior to adjudication because of their responsibility to provide safe schools, the court found.[57]

Another view of the "stay-put" provision emerged in October of 1984, when the District Court for the Southern District of Ohio consid-

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[51] *Id.* The school designated the part-time special education classes as a resource program. *Id.*

[52] *Id.* at 372 (quoting Smith v. Robinson, 468 U.S. 992, 1009 (1984)). The *Smith* Court concluded that Congress envisioned the Act as offering the only avenue for an equal protection claim to special education. *Id.* at 1009. Calling the Act an aid to states for complying with constitutional obligations, the court explained that Congress set up the administrative and judicial mechanisms of the Act for such claims. *Id.*; *see* Wexler v. Westfield Bd. of Educ., 784 F.2d 176, 180 (3d Cir.)(denying attorney fees on grounds that Act was exclusive method of suit and did not provide for attorney fees), *cert. denied*, 479 U.S. 825 (1986); Garrity v. Sununu, 752 F.2d 727, 735 (1st Cir. 1984)(same).

[53] *Victoria L.*, 741 F.2d at 373 (quoting Hendrick County Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 206 (1982)). Although the Act provided that a reviewing court rule on a "preponderance of evidence basis," Congress did not intend for the judiciary to substitute its opinion on educational policy for that of the schools. *Rowley*, 458 U.S. at 206. The Act left responsibility for educational methods for the handicapped to state and local educational agencies working with parents. *Id.* at 207. *See* Tatro v. Texas, 703 F.2d 823, 830 (5th Cir. 1983)(holding that party attacking student placement in suit under Act has burden to show placement was wrong because of presumption in favor of school policy), *aff'd sub nom.* Irving Indep. School Dist. v. Tatro, 468 U.S. 883 (1984).

[54] *Victoria L.*, 371 F.2d at 374.

[55] *Id.* (citing S-1 v. Turlington, 635 F.2d 342, 348 (5th Cir.), *cert. denied*, 454 U.S. 1030 (1981)).

[56] *Victoria L.*, 371 F.2d at 374.

[57] *Id.* In finding for the school, the court said it was clear that Victoria constituted a threat to both students and school officials at Cape Coral High School. *Id.* Parents and school administrators not only failed to cooperate in this case, but actually assumed an "adversarial relationship" in the placement and education of the child. Hill, *Legal Conflicts in Special Education: How Competing Paradigms in the Education for All Handicapped Children Act Create Litigation*, 74 U. DET. L. REV. 129, 156 (1986). This situation typifies those cases that demonstrate the "inability of schools to adapt to the special needs of the handicapped student." *Id.*

ered the temporary removal of two disruptive students from classes in *Lamont X v. Quisenberry*.[58] Two severely behaviorally handicapped students, Del and Lamont,[59] sought injunctions to stop school authorities from preventing their return to school pending completion of proceedings for changing the placement of the handicapped students.[60] After violent outbursts by the two students in August 1984,[61] school officials removed Del from school until January of 1985 and Lamont until May of that year.[62] Although the school provided each student a home tutor for an hour daily,[63] the court recognized prior findings that expulsion represented a change in placement under the Act.[64] While

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[58] 606 F. Supp. 809 (S.D. Ohio 1984).

[59] *Id.* at 811. Del, 15 years old at the time of the suit, and Lamont, 12 years old, fit the meaning of "handicapped" contained in the Act. *Id.* Section 1401(1) includes among the categories of handicapped those children who are "seriously, emotionally disturbed." 20 U.S.C. § 1401(l) (1982). The two lived at the Children's Home of Butler County. *Lamont X*, 606 F. Supp. at 811. The mother of Del, a former resident of a psychiatric hospital, had given up custody of him because of his destructiveness and uncontrollable behavior. *Id.* at 812. Lamont, whose natural mother abused him before releasing custody, had behavioral problems that encompassed "aggressive outbursts, behavior control problems, destructiveness toward property and physical abuse of others . . . and a tendency to be easily stimulated." *Id.*

[60] *Lamont X*, 606 F. Supp. at 811. The procedures required by the Act included a written notice to parents, a hearing, a right to appeal local agency educational decisions to state agencies and other procedural rights. 20 U.S.C. §§ 1415(b), (c) (1982). After exhausting the administrative procedures, a party could file a complaint in state or federal district court. *Id.* § 1415(e)(2). During the pendency of any proceedings, the child should remain in the same placement unless the child's parents or guardian consented to a change. *Id.* § 1415(e)(3).

[61] *Lamont X*, 606 F. Supp. at 812. On August 28, 1984, Del beat a fellow student, ripped the student's shirt, and threw books and a ruler around the classroom. *Id.* On August 30, 1984, Lamont exploded in anger, threatened an instructor and severely damaged a classroom. *Id.* Police removed Lamont from the classroom because school officials considered him a danger to other students and the teacher. *Id.*

[62] *Id.* at 812. The state of Ohio prosecuted, adjudging each a delinquent. *Id.* at 812-13.

[63] *Id.* at 812. School authorities expressed a willingness to provide as much home tutoring as the students could handle. *Id.* at 812 n.1. The school officials asserted Del refused to attend tutoring sessions with any regularity. *Id.*

[64] *Id.* at 813 (citing Doe v. Koger, 480 F. Supp. 225, 228-29 (N.D. Ind. 1979), *aff'd*, 710 F.2d 1209 (7th Cir. 1983) and Kaelin v. Grubbs, 682 F. 2d 595, 599-602 (6th Cir. 1982)). In *Koger*, school administrators expelled a handicapped student for disciplinary reasons. *Koger*, 480 F. Supp. at 226. The court said that the Act prohibited schools from expelling disruptive, handicapped students, but allowed their transfer to a more restrictive environment. *Id.* at 228. A student could be temporarily suspended only until schools found an appropriate, more restrictive setting. *Id.* at 229. The *Koger* Court indicated that handicapped children had no "superior rights." *Id.* Consequently, schools could expel the handicapped in the same manner as the non-handicapped upon a finding

the court warned that all modifications of instruction would not invoke Act proceedings,[65] it nevertheless found that removal from a classroom followed by home-based tutoring constituted a change in placement.[66] Finding that the Act created a "rebuttable presumption" that a child should remain in his current placement pending completion of the proceedings,[67] the court concluded that the school should not have removed Lamont and Del prior to completion of the proceedings without parental consent.[68] The preliminary injunction was, therefore, appropriate unless the defendant could demonstrate an equitable defense.[69] Although the school district argued that federal regulations associated with the Act permitted normal disciplinary actions against violent students during a complaint proceeding,[70] the court found that extended

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that unruly behavior stemmed from the child's willfulness, not his handicap. *Id. But see* Colley, *The Education for All Handicapped Children Act (EHA) A Statutory and Legal Analysis*, 10 J. L. & EDUC. 137, 160 (1981)(arguing that *Koger* approach to expulsion was difficult to manage because of almost insurmountable task of isolating cause of child's misbehavior).

In *Grubbs*, school officials expelled a 15-year-old handicapped student for insubordination, breaking a coffee cup and kicking his teacher. *Grubbs*, 682 F.2d at 597. The court held that an expulsion constituted a change in placement, thus entitling the student to procedural safeguards under the Act. *Id.* at 601-02. *Grubbs* dealt with the specific disciplinary measure in that case and did not establish "black letter" rules for schools. Note, *Kaelin v. Grubbs: The Expanding Outs of Public Schools to Educate the Handicapped*, 14 U. TOL. L. REV. 797, 820 (1983). After *Grubbs*, the commentator argued school officials should formulate "very strict guidelines for the discipline of handicapped students" to insure their adherence to the Act. *Id.*

[65] *Lamont X*, 606 F. Supp. at 813-14 (citing Tilton v. Jefferson County Bd. of Educ., 705 F.2d 800, 804 (6th Cir.), *cert. denied*, 465 U.S. 1006 (1983)). The *Tilton* court noted that defining a "change in placement" to include modification of educational programs would constrain school boards from making even minor changes in academic programs, inhibiting innovation. *Tilton*, 705 F.2d at 804 (quoting Concerned Parents and Citizens for the Continuing Educ. at Malcolm X (PS79) v. New York City Bd. of Educ., 629 F.2d 751, 755 (2d Cir. 1980), *cert. denied*, 449 U.S. 1078 (1981)).

[66] *Lamont X*, 606 F. Supp. at 814. *Id.* Alternate placements included special classes and "home instruction." *Id.* (citing 34 C.F.R. § 300.551 (1988)).

The defendant unsuccessfully argued that a change in placement still did not demand that the child remain in his present placement pending completion of Act proceedings. *Id.* Although defendants maintained that Congress indicated only a preference for preserving the child's placement, the court found the cases inapplicable. *Id.* at 815.

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] *Id.* The defendants relied on a comment in the regulations: "while the placement may not be changed, this does not preclude the agency from using its normal procedures for dealing with children who are endangering themselves or others." *Id.* (citing 34 C.F.R. § 300.513 comment (1988)). *See generally* Stuart v. Nappi, 443 F. Supp. 1235, 1242 n.5

home study represented extraordinary, not normal, discipline by the school,[71] and granted an injunction.[72]

Ruling contrary to *Lamont X*, the Fifth Circuit upheld a school's right to expel students for disciplinary reasons in the 1985 case of *Jackson v. Franklin County School Board*.[73] The *Jackson* case involved a seventeen-year-old learning-disabled student suspended from school for sexual misconduct with a female handicapped student.[74] After youth court action and a month-long stay in a mental hospital, the student sought readmission to school.[75] When school officials refused the request pending the development of an appropriate educational placement, the boy and his mother filed suit in district court, for a preliminary injunction against the continued suspension.[76] At the direction of the court, school officials developed an educational placement plan, rejected by the student and his mother since it denied in-school placement.[77] The Fifth Circuit affirmed the lower court's decision denying Jackson's motion for an injunction despite language in the Act prohibiting changes in educational placement of a handicapped child during the pendency of placement appeals.[78] Citing prior cases,

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(D. Conn. 1978)(explaining that comment inserted to allow school to maintain safety).

[71] *Lamont X*, 606 F. Supp. at 816. A school official testified that the institution's normal disciplinary measures included suspensions of up to ten days or expulsion. *Id.*

[72] *Id.* at 820.

[73] 765 F.2d 535 (5th Cir. 1985). James Jackson attended Franklin County Public Schools in the same facility with non-handicapped students. *Id.*

[74] *Id.* at 536. Jackson's suspension was for three days. *Id.*

[75] *Id.* The youth court committed Jackson to East Mississippi State Hospital where he remained for three months. *Id.*

[76] *Id.* at 537. Jackson orginally filed suit under 42 U.S.C. § 1983 seeking injunctive relief as well as $30,000 in damages. *Id.* Later Jackson filed an amended complaint based on the provisions of the Act. *Id.*

[77] *Id.* The mother later filed a suit seeking a second preliminary injunction to prevent the school board from continuing to refuse to readmit her son. *Id.* The district court denied the request. *Id.*

[78] *Id.* at 537-39. The district court determined that the school board had based its refusal to allow Jackson to remain in his placement on a reasonable conclusion that he "would disrupt the educational process and pose a threat to himself and others." *Id.* at 537.

A year and a half later, however, the Fifth Circuit, in considering a second suit filed by the mother, ruled that school officials on two occasions violated due process procedures under the Act. Jackson v. Franklin County School Bd., 806 F.2d 623, 639 (5th Cir. 1986). The court ruled that school officials failed to provide the mother with prior written notice of proposed changes in the educational placement of her son and also failed to inform her of her right to a hearing regarding the continued exclusion of her son from school. *Id.* at 639. By failing to provide these procedures, the court ruled that the school board deprived the teenager of his right to an education for two months. *Id.* at 631. The

including *S-1*, the Fifth Circuit based its decision on the traditional authority of school boards to maintain safe schools.[79]

The Mississippi Supreme Court offered guidance to school authorities and courts facing situations governed by the Act in *Pascagoula Municipal Separate School District v. Doe*.[80] In *Pascagoula* school personnel suspended a learning disabled tenth-grade student for five days after confiscating six marijuana cigarettes and two knives from him at school.[81] A committee of the school board, conducting a disciplinary hearing at which the student and his parents spoke, voted unanimously to recommend expulsion for the remainder of the academic year. [82] Although the school system offered home-based tutoring,[83] the student appealed to an administrative hearing pursuant to the Act[84] and apparently remained in school awaiting the outcome.[85] Finding for the student, the hearing officer ruled that expulsions were proper only if a student was dangerous or an emergency existed.[86] The Mississippi Supreme Court counseled restraint in expelling students for handicapped-induced misbehavior, emphasizing that schools should first consider less harsh forms of discipline or a change in the child's placement.[87] Expulsions were appropriate, the court found, if the school offered the handicapped student alternate services during the expulsions.[88] Consideration of appropriate punishment, of course, should

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Fifth Circuit remanded the case for a determination of appropriate compensation. *Id.*

[79] *Jackson*, 765 F.2d at 538.

[80] 508 So. 2d 1081 (Miss. 1987).

[81] *Id.* at 1083. The incident occurred March 26, 1984, at Pascagoula High School. *Id.*

[82] *Id.* The student maintained at the hearing that he obtained the marijuana from another student, planning to trade it for knives to add to his collection. *Id.*

[83] *Id.*

[84] *Id.* The Mississippi Department of Education appointed Dr. J. Larry Tyler to conduct the hearings. *Id.*

[85] *Id.* at 1084. The court noted that the student remained in school in compliance with Act regulations codified at 34 C.F.R. § 300.513 (1988). *Id.* at 1084.

[86] *Id.* The officer also considered the expulsion moot since the academic year had ended before the hearing. *Id.* The education state review team affirmed the decision, awarding the student credit for passing grades he had earned since the attempted expulsion. *Id.* The Chancery Court of Jackson County dismissed the school's appeal, ruling that state courts have no jurisdiction under the Act. *Id.* While the case was on appeal to the Mississippi Supreme Court, the student graduated in 1986. *Id.*

[87] *Id.* at 1085. The Act commanded that before expelling a student, school personnel should isolate a handicap as the cause of unruly behavior. *Id.* (quoting S-1 v. Turlington, 635 F.2d 342, 348 (5th Cir. 1981)). If the handicap caused the misbehavior, school authorities should consider a change in placement or less drastic method of discipline before resorting to expulsion. *Pascagoula*, 508 So. 2d at 1085 (quoting School Bd. v. Malone, 762 F.2d 1210, 1217 (4th Cir. 1985)).

[88] *Pascagoula*, 508 So. 2d at 1085. The *Pascagoula* court relied on the Fifth Circuit's

begin with a determination of whether the misconduct flowed from the handicap, the court stated.[89] The court noted that since the student had already graduated, denial of a diploma would not improve discipline.[90] The importance of the *Pascagoula* case, the court maintained, was its precedential value for school and judicial officers in Mississippi.[91]

In the instant case, the United States Supreme Court reasoned that since respondent was twenty years old, had not finished high school, and still lived in California,[92] the Court should have afforded him the benefits and protection of the Act.[93] The Court stated that the congressional intent of the Act constrained it to adjudicate the rights of the respondent.[94] According to the Court, Congress passed the Act to prevent schools from exercising exclusionary practices against hand-

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decision in Jackson v. Franklin County School Board that a school could expel a handicapped student as long as it based the expulsion on a "reasonable conclusion" and provided "quality educational services" in the interim. *Id.* (citing Jackson v. Franklin County School Bd., 606 F. Supp. 152, 154 (S.D. Miss), *aff'd*, 765 F.2d 535 (5th Cir. 1985)).

[89] *Pascagoula*, 508 So. 2d at 1085.

[90] *Id.* Overturning the chancery court decision to the contrary, the court also ruled that state courts have jurisdiction in suits under the Act. *Id.* at 1084. Therefore, Mississippi courts could review both the administrative records, as well as additional evidence during appeals under the Act. *Id.* at 1085. *See* Town of Burlington v. Department of Educ., 736 F.2d 773, 790 (1st Cir. 1984)(finding that additional evidence should be limited to information that only supplemented administrative records or described events that occured after administrative hearings).

[91] *Pascagoula*, 508 So. 2d at 1085.

[92] Honig v. Doe, 108 S. Ct. 592, 601 (1988). The United States Supreme Court reasoned that these qualifications entitled Smith to a "free appropriate public education" in the state of California under the Act. *Id.* Concluding that there was a "reasonable expectation" that courts would again subject Smith to a unilateral "change in placement" for conduct resulting from his handicap, the Court found the instant controversy "capable of repeition, yet evading review", and, therefore, not moot. *Id.* at 601-02.

[93] *Id.* at 601. The Act's protection and benefits were for disabled children between the ages of three and 21. *Id.*

Chief Justice Rehnquist in a concurring opinion addressed the mootness issue, suggesting that the Court should either abandon the doctrine of mootness altogether or at least relax the doctrine in cases at the Supreme Court level. *Id.* at 607-09. *See* Singer, *Justiciability and Recent Supreme Court Cases*, 21 ALA. L. REV. 229, 262, 268 (1968)(advocating abolition of mootness doctrine). In a dissenting opinion joined by Justice O'Connor, Justice Scalia asserted that the instant case was moot, not meeting the limited criteria of a dispute "capable of repetition, yet evading review." *Honig*, 108 S. Ct. at 609. *See generally* Note, *The Mootness Doctrine in the Supreme Court*, 88 HARV. L. REV. 373, 386 (1974)(discussing recognition and application of "capable of repetition yet evading review" exception to mootness doctrine).

[94] *Honig*, 108 S. Ct. at 604.

icapped children without providing alternative education to the students or notice to their parents.[95] The Court explained that parental participation was an integral part of the Act and that the Act effectively barred schools from changing the educational placement of a handicapped child over a parent's objection prior to the conclusion of all review proceedings.[96] Evaluating the language of the Act, the Court said that while it was obvious that Congress had intended "to strip schools of the unilateral authority" to exclude disabled and emotionally disturbed students from school, it was also obvious that the schools were not powerless when faced with a dangerous student.[97] After close analysis of the congressional intent of the Act, the Court refused to recognize the "dangerousness exception" to the Act's "stay-put" provision claimed by the petitioner.[98] Finding no exception to the "stay-put" provision of the Act, the Court concluded that school officials' failure to seek review or parental consent before indefinitely suspending the student constituted a "change in educational placement" and a violation of the "stay-put" provision.[99]

With its decision in *Honig v. Doe*, the United States Supreme

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[95] *Id.* The Court indicated that Congress passed the Act upon finding that schools nationwide excluded one out of every eight disabled children from their classrooms. *Id.* The purpose of the Act, as discussed by the Court, was to require "participating States to educate all disabled children, regardless of the severity of their disabilities." *Id.*

[96] *Id.*

[97] *Id.* at 604-05. The Court interpreted the Act as requiring schools to use normal procedures for dealing with children who endanger themselves or others, including drastic measures such as a ten-day suspension. *Id.* at 605. Additionally, the Court determined that the Act allowed interim placement of a student where the parents and school officials agreed on the student's removal. *Id.* Alternatively, parents or school officials could expedite the placement of a handicapped child by seeking injunctive relief on a showing of the futility or inadequacy of administrative proceedings. *Id.* at 606. In such cases, the moving party would bear the burden of proving that administrative review proceedings would be futile or inadequate. *Id.*

[98] *Id.* at 604. *See supra* notes 6 and 9. The Court concluded that despite Congress' awareness of the danger involving some of the students covered under the Act, it included no "dangerousness exception." *Honig*, 108 S. Ct. at 604-05. Finding that such an omission must have been intentional, the Court refused to create such an exception. *Id.* at 605.

[99] *Honig*, 108 S. Ct. at 604-07. The Court again stated that the school could have sought injunctive relief in the case of dangerous students. *Id.* at 605. In such a suit, the school had to overcome a presumption favoring the school's current educational placement. *Id.* at 606. Additionally, the court, in which injunctive relief was sought, had to use a balancing test to decide whether or not to enjoin the student's school attendance. *Id.* This balancing test would weigh the student's "right to a free appropriate public education" against the school's interest in maintaining a safe learning environment for all its students. *Id.*

Court gave guidance to school officials and handicapped students in Mississippi and throughout the nation concerning their rights under the Act.[100] The most important part of the opinion refused to recognize a "dangerousness exception" to the "stay-put" provision of the Act.[101] This refusal effectively overruled the Fifth Circuit's *Jackson v. Franklin County School Board* as well as the Mississippi Supreme Court's *Pascagoula Municipal Separate School District v. Doe*.[102] School officials will no longer be able to expel or suspend handicapped students for misconduct in the same manner as non-handicapped students.[103]

The highest court in the land has ruled that handicapped students must be afforded special due process rights under the Act before changing their placement. Firstly, school officials can no longer validly argue that they have a duty to remove a dangerous handicapped student immediately.[104] Secondly, school systems will be forced to adapt their classes and teaching methods to meet the special needs of handicapped students as well as rewrite their disciplinary policy to adhere to the Court's ruling that there is not a dangerous child exception.[105]

Additionally, the *Honig* decision has advised school officials as to their rights when faced with a dangerous student.[106] Schools may now seek injunctive relief *before* going through all exhausting and often futile administrative proceedings.[107] However, schools must be aware of the presumption in favor of the student's current educational placement.[108]

Although difficult to estimate the number of handicapped students affected by the Court's ruling, clearly there will be immediate ramifications of the *Honig* decision. The primary impact, however, will be borne by schools forced to teach handicapped students in an environment with their peers, rather than excluding or suspending them based on a "dangerousness exception."[109]

Richard Kent

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[100] *See supra* notes 97, 98, 99 (indicating Court's rejection of "dangerousness exception" and school's right to injunctive relief).

[101] *See supra* note 98 and accompanying text.

[102] *See supra* notes 73-90 and accompanying text.

[103] *See supra* notes 23 and 64.

[104] *Honig*, 108 S. Ct. at 604-05.

[105] *Id.*

[106] *See supra* note 99 and accompanying text.

[107] *Id.*

[108] *Id.*

[109] *See supra* notes 23 and 64.

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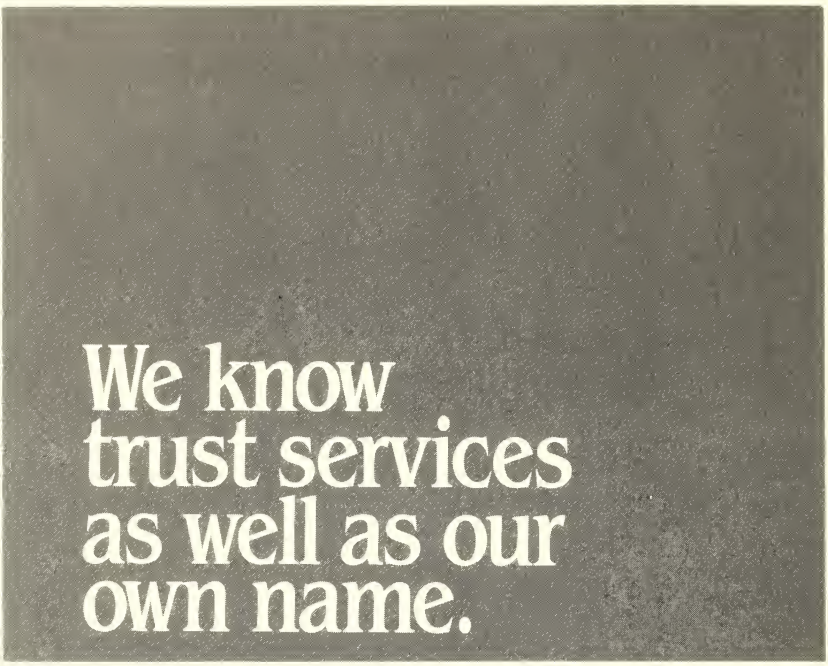

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